Class vs Ms.Anupama.T.V on 30 March, 2021

Author: M.R.Anitha

Bench: M.R.Anitha

C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

TUESDAY, THE 30TH DAY OF MARCH 2021 / 9TH CHAITHRA, 1943

Crl.MC.No.6937 OF 2015(A)

CRMP 1117/2015 DATED 16-10-2015 OF JUDICIAL MAGISTRATE OF FIRST CLASS ,PERUMBAVOOR

PETITIONERS/ACCUSED 1 TO 5

1 MS.ANUPAMA.T.V
AGED 29 YEARS
W/O. MR.CLINSTON, KACHAPPILLY (GAY LORD) HOUSE,
ANGAMALY SOUTH P.O, ERNAKULAM DISTRICT, KERALA STATE
683 572.

2 MR.CLINSTON, AGED 29 YEARS
S/O.PAULOSE, KACHAPPILLY (GAY LORD) HOUSE, ANGAMALY
SOUTH P.O, ERNAKULAM DISTRICT, KERALA STATE 683 572.

3 Ms.NISHA NAIR AGED 25 YEARS
D/O.LATE MR.BALASUBRAMANIANM, PARAYARIKKAL HOUSE, P.O
PURANGU, PANAMPAD, MALAPPURAM 679 584.

4 Ms.CHRIS ALPHONSE, AGED 20 YEARS,
D/O.MR.POULOSE, KACHAPPILLY (GAY LORD) HOUSE, ANGAMALY
SOUTH P.O, ERNAKULAM DISTRICT, KERALA STATE 683 572.

5 D.SIVAKUMAR
S/O.K.DIVAKARAN, FLAT NO.7A1, HEERA PARK, M.P APPAN
ROAD, THYCAUD P.O, VAZHUTHACAUD P.O, THIRUVANANTHAPURAM
695 014.

BY ADV. SRI.R.ANIL

RESPONDENTS/COMPLAINANT

1 STATE OF KERALA

REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM 682 031.

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2 BIJU KARNAN
S/O.K.K.KARNAN, KURAVAMPADATHU HOUSE, OKKAL, KALADY, ERNAKULAM KERALA 683 572.

3 STATION HOUSE OFFICER
PERUMBAVOOR POLICE STATION, ERNAKULAM 683 571.

BY ADV. SMT.VIJAYAKUMARI
BY ADV. SRI.S.SREEKUMAR (SR.)
SENIOR PP SRI.P.K.BABU

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 30.03.2021, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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ORDER

Dated : 30th March, 2021

1. This petition has been filed under Sec.482 Cr.P.C to quash the proceedings in C.M.P.1117/2015 on the file of Judicial Magistrate of First Class, Perumbavoor.

2. The 1st petitioner is a member of the Indian Administrative Service and has been working as Commissioner of Food Safety, as appointed by the 1st respondent. 5Th petitioner is a subordinate Officer of the 1 st petitioner and is the Joint Commissioner appointed for the purpose of Food Safety and Standards Act, 2006. They are public servants. 2 nd petitioner is the husband of the 1st petitioner and 3rd and 4th petitioners are the sister and sister-in-law respectively of the 1st petitioner. They have been arraigned as accused Nos.1 to 5 in Crl.M.P.1117/2015 referred above and it has been forwarded to the 3 rd respondent to conduct an inquiry under Sec.202 Cr.P.C. It has been alleged in the complaint that one year ago, the 2nd respondent/complainant preferred a complaint against the 5th petitioner before the Superior Authority alleging that he had colluded with a competitor of the 2 nd respondent and was indulging in partisan/high-handedness tarnishing the name of the complainant/2nd respondent and its products and was alleged to be instructing its distributors and shop keepers from taking stock and selling the products of the complainant's Company. It is also alleged that the 5th petitioner informed the 2nd respondent that the 1st and 5th petitioners would destroy the name and good-will of the 2nd respondent's Company. The 1st petitioner issued an emergency ban on 3.9.2015 upon three products of the 2nd respondent's

Company restraining the manufacture and sale of its products, as a result of which the complainant has to close down the Unit and emergency ban has been passed without any bona fides. Some allegations are also made against petitioners 2 to 4 and it is further alleged that the 2nd respondent had an average loss of Rs.20 Crores due to the unprofessional/unethical acts of petitioners 1 to 5 and a writ petition has been filed as W.P.C.30005/2015 before this Court.

3. Sworn statement of the second respondent/complainant was recorded in pursuance of Annexure-A1 complaint. Thereafter the learned Magistrate ordered inquiry under Sec.202 Cr.P.C to ascertain whether there are sufficient grounds for proceeding. Accordingly SHO, Perumbavoor Police Station, was directed to conduct the inquiry and file report.

4. According to the petitioner, the entire procedure adopted by the learned Magistrate is an abuse of process of law and no offence as such is made out from the complaint. Though complaint was originally filed under Sec.156(3)Cr.P.C. for forwarding to the SHO, the learned Magistrate conducted enquiry and thereafter called for a report from the SHO. It is also vehemently contended that the entire proceedings against the 1st and 5th petitioners are vitiated for want of sanction under Sec.197 Cr.P.C.

5. The learned counsel for the 2nd respondent on the other hand, would contend that the petitioners have not been arraigned as accused and though the learned Magistrate took the sworn statement of the complainant for further enquiry, it has been forwarded to the SHO U/S 202 CrPc and no process has been issued against the petitioners as accused and hence the Crl.M.C is premature and is liable to be dismissed on that ground alone.

6. The points that emerges for consideration are (i) whether the petition filed is premature (ii) whether proceedings initiated against the petitioners 1&5 is bad for want of sanction under Sec.197 Cr.P.C.

7. Point:No.1 :-

> According to the learned Senior counsel for the 2 nd respondent, the learned Magistrate has not taken cognizance of the offence against the petitioners and no process has been issued by the Magistrate under Sec.204Cr.P.C. and hence the petitioners have no locus standi to file the present petition for quashing the proceedings. It is also his contention that only when process has been issued by the Magistrate under Sec.204Cr.P.C. it can be stated that cognizance has been taken and then only the petitioners would have an option to contest the matter. Here the learned Magistrate has sent the matter for enquiry under Sec.202 Cr.P.C and hence cognizance is yet to be taken and hence according to him, the present proceedings initiated by the petitioners is highly premature.

8. The learned counsel for the petitioners on the other hand, would contend that the Magistrate has already taken cognizance when it has decided to proceed with the complaint and took the statement of the complainant and hence it cannot be contended that the cognizance has not been taken.

Reliance was placed on Devarapalli Lakshminarayana Reddy v. V.Narayana Reddy (1976 KHC 818) and M/s.Kunstocom Electronics (I) Pvt.Ltd v. Gilt Pack Ltd. and another (2002 KHC 1142). Paragraph No.17 of Devarapalli's case is relevant to be extracted which reads as follows :

> "S.156 (3) occurs in Chapter XII, under the caption:
>
> "Information to the Police and their powers to investigate"; while S.202 is in Chapter XV which bears the heading "complaints to Magistrates". The power to order police investigation under s. 156(3) is different from the power to direct investigation conferred by s. 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 s. 156(3)can be invoked by the Magistrate before he takes cognizance of the offence under s. 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 s. 156(3). It may be noted further that an order made under sub-section (3) of s. 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under s. 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under S.156 and ends with a report or charge sheet under S. 173. On the other hand S.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 s. 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 s. 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.

9. But it is also to be noted that in paragraph 19 of the said decision it has been categorically found that no final opinion on the ambit and scope of 1st Proviso to Sec.202(1) of Cr.P.C is expressed therein and it is further found that the stage at which Sec.202 could become operative was never reached in that case. That was a case in which the Magistrate only ordered an investigation under Sec.156(3) Cr.P.C and he did not bring into motion the machinery under Chapter XV which deals with complaints to Magistrates. Though the learned counsel relies on M/s.Kunstocom, it does not appear to have any application in the present case because that was a case in which the petition was filed under Sec.482 Cr.P.C for quashment of a complaint filed alleging commission of offence under Sec.415 IPC. It was challenged on the ground of propriety of the order of Magistrate in taking cognizance and she processed on the ground that no offence can be said to have been made out from the allegations. But the High Court disposed of that petition with the observation that accused shall have right to raise all grounds at the time of framing charge. It was in the said context that the Hon'ble Supreme Court held that the order passed by the High Court is not legal and hence set aside

and the case was remitted to the High Court for fresh disposal. That is not the situation in the present case.

10. The learned counsel for the respondent at the outset would contend that the relevant paragraph extracted from Devarapalli Lakshminarayana Reddy has been held to be not good law by the Apex Court in Vinubhai Haribhai Malaviya and Others v. State of Gujarat and Another (2019 (5) KHC 352 [SC]). In that case the Apex Court was mainly considering whether after a charge-sheet has been filed by police, Magistrate has power to order further investigation and it has been held that Magistrate possesses power to order further investigation even after charge-sheet is filed and cognizance has been taken and that power is available to the Magistrate at all stages of the progress of criminal cases before trial actually commences (trial commences with the framing of charges). Various decisions of the Apex Court and of the High Courts have been discussed in the above decision. Paragraph No.17 of Devarapalli Lakshminarayana Reddy has also come up for consideration and in answer to the same, in paragraph 26, it has been held as follows :

> "Section 2(h) is not noticed by the aforesaid judgment at all, resulting in the erroneous finding in law that the power under Section 156 (3) can only be exercised at the pre-cognizance stage. The "investigation" spoken of in Section 156 (3) would embrace the entire process, which begins with the collection of evidence and continues until charges are framed by the Court, at which stage the trial can be said to have begun. For these reasons, the statement of the law contained in paragraph 17 in Devarapalli Lakshminarayana Reddy (supra) cannot be relied upon."

11. From the above what could be gathered is that though it has been held that paragraph 17 of Devarapalli Lakshminarayana Reddy cannot be relied upon, it appears that the thrust was upon Sec.156(3) Cr.P.C and whether it can be exercised only at the pre-cognizance stage which was the law laid down in Devarapalli Lakshminarayana Reddy. Ultimately it has been found that investigation as defined under Sec.2(h) of the Cr.P.C would embrace the entire process under Sec.156(3) and continues until the charges are framed by the Court. So also, even in Devarapalli Lakshminarayana Reddy, there is no specific finding that Sec.202 is a post-cognizance stage and it expressly says that Sec.202 enquiry contemplated 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. So the dictum laid down in Vinubhai Haribhai Malaviya does not actually cover the question paused in this case. Here the question as stated earlier, is whether the further enquiry ordered by the Magistrate under Sec.202 Cr.P.C would lead to an inference that the Court has already taken cognizance of the case or not.

12. Manharibhai Muljibhai Kakadia and Another v. Shaileshbhai Mohanbhai Patel and Others ((2012) 10 SCC 517) was relied on by the learned counsel for the second respondent to contend that in proceedings under Sec.202, accused/suspect is not entitled to be heard on question whether process should be issued against him or not. Upto the stage of issuance of process accused cannot claim any right of hearing. The question when actually cognizance has been taken in a complaint case, has also been discussed in that decision. The learned counsel highlighted paragraph No.46 which reads as follows :

> "The legal position is fairly well-settled that in the proceedings under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, upto the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs 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. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. The Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence."

13. So the proposition of law laid down above would make it clear that u/s.202 Cr.P.C. the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. In other words at the stage of issuance of process accused cannot claim any right of hearing. It also make it clear that Sec.202 contemplate postponement of issuance of process where the Magistrate is of the opinion that further enquiry into the complaint by himself is required and he proceeds with the further enquiry or direct an investigation to be made by a police officer to find whether there is sufficient ground for proceeding. So even at that stage it cannot be found that Magistrate has made up his mind to proceed against the accused and that is why further enquiry or investigation has been ordered. So unless and until process has been issued against the accused u/s.204, it cannot be said that accused has got a right of hearing. Hence the contention so advanced by second respondent is only to be upheld.

14. Point No.(ii):-

> According to the learned counsel, the entire proceedings is vitiated against petitioners Nos.1 and 5 for want of sanction under Sec.197 Cr.P.C. To attract the bar under Sec.197 Cr.P.C, the conditions to be satisfied are, the accused should be a public servant,he should not be removable from his office except by or with the sanction of the Government and that the offence alleged to have been committed by him should be one while acting or purporting to act in discharge of his official duty. If those conditions are satisfied the bar under S.197 come into play and no Court shall take cognizance of the offence except with the previous sanction of the Central Government or State Government as the case may be.

15. Here as far as the 1st petitioner is concerned, there will not be any dispute that she is a public servant nor removable from the office by or with the sanction of the Central or state Government according to the terms of her service. As far as the fifth petitioner is concerned though he is a public servant the materials produced are not sufficient to conclude that he is removable from office by or with the sanction of the Government. However a finding in that aspect is not necessary for the disposal of this case in view of the question of law involved for the disposal of this petition.

16. The allegations in the complaint which is marked as Annexure-1 and the copy of the sworn statement which has been marked as Annexure-2 would prima facie shows that complaint arose in pursuance of an action taken by the 1 st and 5th petitioners under Food Safety and Standards Act, 2006 for the alleged manufacture and sale of adulterated spices powder. Annexure-4 is the certified copy of the judgment which would show that as per judgment dated 13.10.2015 the prohibitory order passed by the 1 st petitioner had been set aside by this court. So complaint has been filed with respect to an act alleged to have been committed by the petitioners 1&5 in discharge of their official duties.

17. The learned counsel for the petitioners would vehemently contend that as soon as the Magistrate decided to proceed under Sec.200 Cr.P.C and recorded the sworn statement of the complainant and thereafter proceeded to the next step of ordering enquiry under Sec.202 calling for a report from the SHO concerned, cognizance of the offence has been taken and hence want of sanction as far as the 1 st and 5th petitioners are concerned vitiates the entire proceedings. The learned counsel for the respondent on the other hand vehemently contend that the question of sanction would arise only at the time of issue of process and hence the contention regarding the sanction is also premature, according to him.

18. The term 'taking cognizance' has not been defined in the Code Of Criminal procedure. In a recent decision Jayant and Others v. State of Madhya Pradesh (2021 (2) SCC 670) the question regarding taking cognizance has been discussed in detail by the Hon'ble Supreme Court after a discussion of the precedents in the field, State of U.P v. Paras Nath Singh (2009 6 SCC 372), State of W.B v. Mohd. Khalid (1995 1 SCC 684), Stte through C.B.I v. Raj Kumar Jain 1998 KHC 1128 = 1998 (6) SCC 551), K.Kalimuthu v. State 2005 (4) SCC

512), State of Karnataka v. Pastor P. Raju (2006 (6) SCC

728) and also Dr.Subramanian Swamy v. Dr.Manmohan Singh and Another (2012 3 SCC 64).

19. In Paragraph Nos. 20, 21, 22, 23 and 24 of Dr.Subramanian Swamy's case are relevant to be extracted which read as follows :

20. "......R.R.Chari v. State of U.P. (AIR 1951 SC

207) wherein the three Judge Bench approved the following observation made by the Calcutta High Court in Superintendent and Remembrancer of Legal affairs, West Bengal v. Abni Kumar Banerjee, has been quoted, which reads as follows :

> "What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190(1)
>
> (a),Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

21. In Mohd. Khalid's case, the Court referred to Section 190 of the CrPC and observed :

> "In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word `cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons."

22. In Pastor P. Raju's case, this Court referred to the provisions of Chapter XIV and Sections 190 and 196(1-A) of the CrPC and observed :

> "There is no bar against registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of investigation, as contemplated by Section 173 CrPC. If a criminal case is registered, investigation of the offence is done and the police submits a report as a result of such investigation before a Magistrate without the previous sanction of the Central Government or of the State Government or of the District Magistrate, there will be no violation of Section 196(1-A) CrPC and no illegality of any kind would be committed."

The Court then referred to some of the precedents including the judgment in Mohd. Khalid's case and observed :

> "It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has

> been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

23. In Kalimuthu's case, the only question considered by this Court was whether in the absence of requisite sanction under Section 197 CrPC, the Special Judge for CBI cases, Chennai did not have the jurisdiction to take cognizance of the alleged offences. The High Court had taken the view that Section 197 was not applicable to the appellant's case. Affirming the view taken by the High Court, this Court observed :

> "The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage. Further, in cases where offences under the Act are concerned, the effect of Section 197, dealing with the question of prejudice has also to be noted."

24. In Raj Kumar Jain's case, this Court considered the question whether the CBI was required to obtain sanction from the prosecuting authority before approaching the Court for accepting the report under Section 173 (2) of the CrPC. This question was considered in the backdrop of the fact that the CBI, which had investigated the case registered against the respondent under Section 5(2)read with Section 5(1)(e) of the 1947 Act found that the allegation made against the respondent could not be substantiated. The Special Judge declined to accept the report submitted under Section 173(2) CrPC by observing that the CBI was required to place materials collected during investigation before the sanctioning authority and it was for the concerned authority to grant or refuse sanction. The Special Judge opined that only after the decision of the sanctioning authority, the CBI could submit the report under Section 173(2). The High Court dismissed the petition filed by the CBI and confirmed the order of the Special Judge. This Court referred to Section 6(1) of the 1947 Act and observed:

> "From a plain reading of the above section it is evidently clear that a court cannot take cognizance of the offences mentioned therein without sanction of the appropriate authority. In enacting the above section, the legislature thought of providing a reasonable protection to public servants in the discharge of their official functions so that they may perform their duties and obligations undeterred by vexatious and unnecessary prosecutions. Viewed in that context, the CBI was under no obligation to place the materials collected during investigation before the sanctioning authority, when they found that no case was made out against the respondent. To put it differently, if the CBI had found on investigation that a prima facie case was made out against the respondent to place him on trial and accordingly prepared a charge-sheet (challan) against him, then only the question of obtaining sanction of the authority under Section 6(1) of the Act would have arisen for without that the Court would not be competent to take cognizance of the charge-sheet. It must, therefore, be said that both the Special Judge and the High Court were patently

wrong in observing that the CBI was required to obtain sanction from the prosecuting authority before approaching the Court for accepting the report under Section 173(2) CrPC."

20. After a discussion of precedents in the field in Jayant V State of M.P. the Hon'ble Supreme Court held that High court has not committed any error in not quashing the order passed by the learned Magistrate. In that case Magistrate actually invoked the power under Sec.156(3) Cr.P.C.

21. The irresistible conclusion from the above settled position of law is that the word cognizance has a wider connotation and not merely the stage of taking cognizance of the offence. In the present case the proceedings initiated by the learned Magistrate would show that after taking sworn statement of PW1 being not satisfied of the materials produced, the Court ordered further enquiry under S.202 and that would make it clear that the Court has not yet made up the mind to issue process against the petitioners. If after the report has been submitted by the S.H.O. the Magistrate drop the proceedings against the petitioners U/S 203Cr.P.C., obtaining sanction u/s 197 would be a futile exercise. That would in turn leads to a conclusion that sanction can be insisted only at the time of issuing process against the accused u/s 204 Cr.Pc. So at present the petitioners cannot be heard to contend that the proceedings initiated is bad for sanction under Sec.197 Cr.P.C.

22. During the course of hearing it has come out that the judicial First Class Magistrate-1 Perumbavoor once issued a notice to first petitioner calling upon to appear before the court on 01.12.2018, on information by the counsel for the second respondent that interim stay has not been extended by this Court. The learned Magistrate by letter dated 16.3.2021 admitted that fact also. When a case has been referred for enquiry by police under Sec.202 Cr.P.C magistrate will not have any jurisdiction to issue notice to accused. Notice so issued to the first petitioner is arbitrary and capricious and it is hereby set aside.

23. In the result the Crl.M.C. is found to be premature and hence dismissed.

Sd/-

M.R.ANITHA, Judge Mrcs/24.3.

APPENDIX ANNEXURES ANNEXURE P1 ANNEXURE A1. COPY OF THE CRMP 1117/15 IN THE COURT OF JUDICIAL MAGISTRATE OF THE FIRST CLASS, PERUMBAVOOR.

ANNEXURE P2 ANNEXURE A1I. COPY OF THE SWORN STATEMENT OF THE COMPLAINANT IN CRMP 1117/15 DATED 15.10.15.

ANNEXURE P3 ANNEXURE AII1. COPY OF THE ORDER SHEET IN CRMP 1117/15 BEFORE THE JUDICIAL MAGISTRATE OF THE FIRST CLASS, PERUMBAVOOR.

ANNEXURE P4 ANNEXURE A1V. COPY OF THE JUDGMNET OF THIS HONOURABLE COURT DATED 13.10.15 IN WPC 30005.