IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

Tuesday, the 9th day of July 2024 / 18th Ashadha, 1946

CRL.MC NO. 4677 OF 2022

CRMP 318/2021 IN CRL M.P.NO 60/2021 OF ENQUIRY COMMISSIONER & SPECIAL JUDGE, KOTTAYAM

PETITIONER/COMPLAINANT:

A.K.SREEKUMAR AGED 43 YEARS EDAPPALLYKURATH HOUSE, PUTHUPPALLY.P.O., KOTTAYAM,PRESENTLY RESIDING AT KANDATHIL TOURIST HOME COMPLEX, SASTHRI ROAD, KOTTAYAM, PIN - 686011

RESPONDENTS/STATE & RESPONDENTS:

1. **STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM-, PIN - 682031**
2. **MAR KURIAKOSE SEVERIOSE MAR APREM SEMINARY,CHINGAVANAM P.O., KOTTAYAM, PIN - 686531**
3. **PRASAD JOSEPH KOYICKAL HOUSE,ANGADY P.O., RANNY., PIN - 689674**
4. **BOBY KURIAN THEKKATHIL (HOUSE), RANNI P.O.., PIN - 689672**
5. **SAJAN ABRAHAM NICHUVELIL HOUSE,THIRUVALLA P.O., PIN - 689101**
6. **T.O. ABRAHAM THOTTATHIL (HOUSE),THURUTHYKKADU P.O.,MALLAPPALLY., PIN - 689597**
7. **BINU KURUVILA KALLEMANNIL HOUSE,WEST OTHARA P.O., THIRUVALLA, PIN - 689551**
8. **FR. V.A. ABRAHAM ILAYSSERIL HOUSE,KUTTOOR P.O., THIRUVALLA, PIN - 689102**
9. **FR. MATHEW UTHUPPAN CHERUKARAYATH, MAZHUKKEER,THIRUVALLA, PIN - 689121**
10. **FR. JAIN THOMAS KULATHUKAL (HOUSE), THURUTHIKKADU, MALLAPPALLY,, PIN - 689597**

This Criminal Misc. case again coming on for orders, upon perusing the petition and upon hearing the arguments of M/s.SOORAJ T.ELENJICKAL, RENOY VINCENT, HELEN P.A, ARUN ROY & SHAHIR SHOWKATH ALI, Advocates for the petitoner and the PUBLIC PROSECUTOR for the 1st respondent and of M.K.SREEKESH appointed as Amicus Curiae, the Court passed the following:

"CR"

K. BABU, J.

Crl.M.C.No.4677 of 2022

Dated this the 9th day of July 2024

O R D E R

The challenge in this Crl.M.C. is to the common order dated 17.06.2022 in Crl.M.P.Nos.60 and 318 of 2021 passed by the Court of the Enquiry Commissioner and Special Judge, Kottayam.

2. The petitioner filed a complaint as Crl.M.P.No.60 of 2021 before the Special Judge, arraying respondent Nos. 2 to 10 as accused, alleging that they illegally collected capitation fee for admitting students to Nazareth Pharmacy College run by the Nazareth Ashramam Society. The petitioner alleged that respondent Nos.2 to 10 discharge public duty, and hence, they fall within the purview of 'Public Servant' as defined under

Section 2(viii) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the PC Act 1988'). The petitioner alleged that respondents 2 to 10 committed offences punishable under Section 13 of the PC Act 1988, Sections 406 and 409 of the IPC and Section 5 read with Section 15 of the Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006. The petitioner requested the Special Judge to order investigation under Section 156(3) of the Code by filing a separate application as Crl.M.P.No.318 of 2021.

3. The Special Judge dismissed the application, observing that the alleged act of collection of capitation fee and its misappropriation cannot

strictly be said to be not relating to a recommendation or decision taken while discharging the functions of the Nazareth Ashramam and Pharmacy College and hence prior approval of the competent authority under Section 17-A of the PC Act, 1988 is necessary for ordering an inquiry or investigation into the allegations in the complaint.

4. The operative portion of the order reads thus:

> "In the result, Crl.M.P.No.318/2021, seeking to forward the complaint under Section 156(3) Cr.P.C. for investigation, is dismissed.
>
> The private complaint Crl.M.P.No. 60/2021 is adjourned for producing approval of the competent authority under Sec. 17A of the Prevention of Corruption Act, 1988."

5. As per the impugned order, the question of whether respondent Nos. 2 to 10 come within the definition of public servants and are liable to be

prosecuted under the penal provisions of the PC Act 1988 was deferred to be considered at an appropriate stage.

6. The Special Judge relying on **Anilkumar and Ors. v. M.K. Aiyappa and Anr.**[1], **L. Narayana Swamy v. State of Karnataka and Ors.**[2], **Manju Surana v. Sunil Arora**[3], **Muhammed V.A. and Ors. v. State of Kerala and Ors.**[4] and **Shylaja P. v. Vigilance & Anti Corruption Bureau Director and Others**[5] held that in the absence of sanction under Section 19(1) of the P.C. Act, the court could not have forwarded the complaint under Section 156(3) of the Code for investigation. The learned Special Judge further held that approval of the competent authority as provided under Section 17-A of the P.C. Act is a

1 (2013) 10 SCC 705
2 AIR 2016 SC 4125
3 (2018) 5 SCC 557
4 2019 (1) KHC 239
5 2021 (2) KHC 11

pre-requisite for directing an investigation.

7. I have heard the learned counsel for the petitioner Sri.Sooraj Thomas, the learned Special Government Plaeder (Vigilance) Sri. A. Rajesh and the learned Amicus Curiae Sri.M.K.Sreegesh.

8. The learned counsel for the petitioner submitted that the court below ought to have forwarded the complaint for investigation under Section 156(3) of the Cr.P.C. as sanction under Section 19 of the P.C Act is applicable only at the time of taking cognizance of the offences by the court and the decision to order investigation under Section 156(3) is at a pre-cognizance stage. The learned counsel for the petitioner submitted that the question of approval comes into play only when the alleged offences are relatable to any recommendation made or decision taken by the public

servant in discharge of his public functions or duty. The learned counsel relied on **Sankara Bhat and Others v. State of Kerala and Others**[6] in support of his contention.

9. The learned Amicus Curiae Sri.M.K.Sreegesh elaborately addressed arguments on all the relevant aspects, relying on the relevant precedents on the subject. I will consider the submissions of the learned Amicus Curiae in detail in the various stages of the consideration of the matter.

10. In **Anilkumar and Ors. v. M.K. Aiyappa and Anr.**[7] the Two- Judge Bench of the Hon'ble Supreme Court considered the question of whether a Special Judge can refer a private complaint for investigation under Section 156(3) of the Cr.P.C without securing a valid sanction under Section 19

6 2021 (5) KHC 248
7 (2013) 10 SCC 705

of the P.C Act. In **Anilkumar**[8], the Special Judge, after going through the private complaint, documents and hearing the complainant, referred the matter for investigation by the Deputy Superintendent of Police under Section 156(3) of Cr.PC. The order was challenged before the High Court. The High Court held that irrespective of whether the Court was acting at pre-cognizance stage or post-cognizance stage, if the complaint pertains to a public servant, the Special Judge is not empowered to take notice of the private complaint unless the same was accompanied by an order of sanction. The matter reached the Supreme Court. Following **Maksud Saiyed v. Sate of Gujarat and Others**[9], **State of U.P. v. Paras Nath Singh**[10],

8 (2013) 10 SCC 705
9 (2008) 5 SCC 668
10(2009) 6 SCC 372

State of W.B and Another v. Mohd Kalid and Others[11] **and Subramanian Swamy v. Manmohan Singh and Another**[12]**,** the Supreme Court held thus:

> "15. The judgments referred to hereinabove clearly indicate that the word "cognizance" has a wider connotation and is not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) CrPC, obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 CrPC and the next step to be taken is to follow up under Section 202 CrPC. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage."

11(1995) 1 SCC 684
12(2012) 3 SCC 64

11. The Supreme Court further held thus:

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

12. The propositions laid down by the Supreme

Court in **Anilkumar and Ors. v. M.K. Aiyappa and Anr.**[13] are as follows:-

(a) The word 'cognizance' has a wider connotation.

(b) It is not confined to the stage of taking cognizance.

(c) When a Special Judge refers a complaint for investigation, obviously he has not taken cognizance of the offence and it is a pre-cognizance stage and not a post- cognizance stage.

(d) The Special Judge referring case for investigation under Section 156(3) is at pre-cognizance stage.

(e) Dehors sanction under Section 19 of the P.C. Act the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) Cr.PC.

13 (2013) 10 SCC 705

13. In **L. Narayana Swamy v. State of Karnataka**[14], a similar question was considered by the Supreme Court. The Supreme Court referring to the judgments in **Manharibhai Muljibhai Kakadia and Ors v. Shaileshbhai Mohanbhai Patel and Ors.**[15], **Anilkumar and Ors. v. M.K. Aiyappa and Anr.**[16], **State of W.B and Another v. Mohd Kalid and Others**[17] and **Subramanian Swamy v. Manmohan Singh and Another**[18] held that an order directing further investigation under Section 156(3) Cr.P.C cannot be passed in the absence of valid sanction.

14. Various High Courts, including this Court, followed the principles declared in **Anilkumar and Ors. v. M.K. Aiyappa and Anr.**[19] and **L.Narayanaswamy**

14(2016) 9 SCC 598
15(2012) 10 SCC 517
16(2013) 10 SCC 705
17(1995) 1 SCC 684
18(2012) 3 SCC 64
19 Supra note.16

v. State of Karnataka[20].

AnilKumar[21] referred to a Larger Bench.

15. In **Manju Surana v. Sunil Arora[22]**, the Supreme Court noted that the proposition laid down in **AnilKumar[23]** is at variance with the proposition laid down by the larger Bench of the Supreme Court. In **Manju Surana v. Sunil Arora[24]** the Supreme Court observed as follows:

> "35. The complete controversy referred to aforesaid and the conundrum arising in respect of the interplay of the PC Act offences read with CrPC is, thus, required to be settled by a larger Bench. The papers may be placed before the Hon'ble the Chief Justice of India for being placed before a Bench of appropriate strength."

16. The Supreme Court referred the issue as regards whether it is open to the Magistrate to

20 (2016) 9 SCC 598
21 (2013) 10 SCC 705
22 (2018) 5 SCC 557
23 Supra note.21
24 Supra note.22

direct an investigation under Section 156(3) without prior sanction to a larger bench.

Maneesh v. State of Kerala[25]

17. In **Maneesh v. State of Kerala**[26], while considering the legality of an order passed by a Special Judge rejecting a complaint seeking relief of investigation under Section 156(3) this Court, following the dictum laid down in **AnilKumar**[27]**,** held that the Special Court ought to have followed the ratio laid down by the Constitution Bench in **Matajog Dobey v. H.C. Bhari**[28] to the effect that sanction was required at the stage of taking cognizance only and not prior to it.

Muhammed V.A. and Others v. State of Kerala and Others[29]

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25 2016(1) KLT 323
26 ibid
27(2013) 10 SCC 705
28 AIR 1956 SC 44
29 2019 (1) KHC 239

18. In **Koshy John v. State of Kerala**[30], by the order dated 17.12.2015, the learned Single Judge of this Court observed that the judgment in **AnilKumar**[31] is directly in conflict with the law enunciated by three Judges Bench in **R.R.Chari v. The State of U.P**[32], **Gopal Das Sindhi v. State of Assam and Another**[33], **Jamuna Singh and Others v. Bhadai Shah**[34] and **Devarapalli Laxminarayana Reddy and Others v. V. Narayana Reddy and Others**[35] and formulated the questions to be placed for consideration before the Division Bench.

19. The Division Bench answered the reference in **Muhammed V.A. and Others v. State of Kerala and Others**[36] holding that until a final decision is

30 W.P.(C)No. 4389 of 2014
31 (2013) 10 SCC 705
32 AIR 1951 SC 207
33 AIR 1961 SC 986
34 AIR 1964 SC 1541
35 (1976) 3 SCC 252
36 2019 (1) KHC 239

taken by the Supreme Court in the pending reference consequent to the judgment in **Manju Surana**[37] the dictum laid down in **AnilKumar**[38] holds the field.

Cases in line with the law laid down in Muhammed[39]

(a) **Sunil Garg v. The Officer-In-Charge, Anti-Corruption Branch, Goa & Ors**[40]**.**

The Division Bench of the High Court of Judicature at Bombay (Panaji Bench) in **Sunil Garg**[41] observed that as the settled position is that a reference to a larger bench does not mean that the legal position holding the field is suspended, the law laid down in **AnilKumar**[42] holds the field.

(b) **Shylaja P. v. Vigilance and Anti-Corruption Bureau Director and Ors.**[43]

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37 (2018) 5 SCC 557
38 (2013) 10 SCC 705
39 2019 (1) KHC 239
40 MANU/MH/3843/2018
41 ibid
42 (2013) 10 SCC 705
43 2021 (2) KHC 11

In **Shylaja P. v. Vigilance and Anti-Corruption Bureau Director and Ors.**[44], a Single Judge of this Court relying on **AnilKumar**[45] and **Muhammed**[46], laid down the proposition that on receiving the complaint, the learned Special Judge could not have forwarded it under Section 156(3) of the Code for investigation, in the absence of any sanction under Section 19(1) of the P.C. Act.

(c) Brinda Karat & Ors. v. State Of NCT Of Delhi & Ors[47]**.**

In **Brinda Karat & Ors. v. State Of NCT of Delhi & Ors**[48], a learned Single Judge of the High Court of Delhi rejected the argument that the law laid down in **Anilkumar**[49] does not lay down the correct law and held that until the judgment which has been

44 2021 (2) KHC 11
45 (2013) 10 SCC 705
46 2019 (1) KHC 239
47 MANU/DE/2161/2022
48 ibid
49 Supra note.45

referred to a larger bench is overruled, the said judgment occupies the field and continues to operate as a good law.

(d) **Balan v. State of Kerala** [50]

In **Balan v. State of Kerala**[51], a learned Single judge of this Court placing reliance on **Muhammed**[52] held that until a final decision is taken in the reference in **Manju Surana**[53], the law laid down in **Anilkumar**[54] holds the field.

20. The learned Amicus Curiae referring to **Shylaja**[55] and **Muhammed**[56] submitted that though in both the judgments there are reflections that the Benches had adverted to the amended provisions in the P.C Act by way of Act, 16 of 2018, the Court

50 2023 (2) KHC 281
51 ibid
52 2019 (1) KHC 239
53 (2018) 5 SCC 557
54 (2013) 10 SCC 705
55 2021 (2) KHC 11
56 Supra note.52

had no occasion to appreciate the issue whether the specific insertion of Section 17-A of the P.C Act reflected the intention of legislature to treat the stages of cognizance being different from investigation.

Jayant and Ors. v. State of Madhya Pradesh[57]

21. The learned Amicus Curiae heavily relied on **Jayant**[58], to submit that the law as expounded there is in consonance with the law laid down by larger Benches of the Supreme Court in the cases of **R.R.Chari v. The State of U.P**[59]**,A. R. Antulay v. R.S Nayak**[60] **and Gopal Das Sindhi v. State of Assam and Another**[61]. The learned Amicus Curiae has taken me to **Jayant**[62] and other larger bench decisions. In

57 (2021) 2 SCC 670
58 ibid
59 AIR 1951 SC 207
60 (1984) 2 SCC 500
61 AIR 1961 SC 986
62 Supra note.57

Jayant[63] the Supreme Court considered the stage at which the Magistrate can be said to have taken cognizance in the context of Section 22 of the Mines And Minerals (Development and Regulation) Act, 1957 (MMDR Act).

22. Section 22 of the MMDR Act reads thus:

> "22.**Cognizance of offences.-** No court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government."

23. The Section interdicts the court from taking cognizance of any offence punishable under the MMDR Act except upon a complaint in writing made by a person authorised on this behalf by the Central Government or the State Government.

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63 (2021) 2 SCC 670

24. In **Jayant**[64] the learned Magistrate in exercise of the powers under Section 156(3), CrPC. directed the SHO of the police station to lodge/register the crime/FIR and directed him to submit a report after due investigation. In the backdrop of these facts, the Supreme Court examined the stage when the Magistrate is said to have taken cognizance of the offence. The question taken up before the Supreme Court was whether the order issued by the Magistrate directing investigation under Section 156(3) is tantamount to taking cognizance. The issue that came before the Supreme Court in **Jayant**[65] is identical to the issue involved in **AnilKumar**[66]. In **Jayant**[67] the Supreme Court referred to a series of precedents such as **R.R.**

64 (2021) 2 SCC 670
65 ibid
66 (2013) 10 SCC 705
67 Supra note 64

Chari v State of U.P.[68], Krishna Pillai v T.A. Rajendran and Anr[69], A. R. Antulay v. R.S Nayak[70], Narayandas Bhagwandas Madhavdas v. State of W.B[71], Gopal Das Sindhi v. State of Assam and Another[72], Nirmaljit Singh Hoon v. State of West Bengal[73], Devarapalli Laxminarayana Reddy and Others v. V. Narayana Reddy and Others[74], M.L Sethi v. R.P.Kapur[75], Fakhruddin Ahmad v. State of Uttaranchal[76], Subramanian Swamy v. Manmohan Singh and Another[77], State of W.B and Another v. Mohd Kalid and Others[78], State of Karnataka v. Pastor P. Raju[79] and **AnilKumar v. M.K. Aiyyapa[80].**

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68 AIR 1951 SC 207
69 1990 (Supp) SCC 121
70 (1984) 2 SCC 500
71 AIR 1959 SC 1118
72 AIR 1961 SC 986
73 (1973) 3 SCC 752
74 (1976) 3 SCC 252
75 AIR 1967 SC 528
76 (2008) 17 SCC 157
77 (2012) 3 SCC 64
78 (1995) 1 SCC 684
79 (2006) 6 SCC 728
80 (2013) 10 SCC 705

25. The Supreme Court, after adverting to the law declared in those cases, held that when the learned Magistrate directed the police to register an FIR, conduct investigation, and submit a report, it cannot be said that the Magistrate had taken cognizance of the alleged offence and that the bar under Section 22 of the MMDR Act is not attracted and the same does not operate as an embargo for registration of the FIR or investigation of a criminal case or submission of report by the Police under Section 173(8) of the code.

26. It is profitable to extract the relevant portions of the judgment in **Jayant**[81]:

> **"12.**Having heard the learned counsel for the parties and having perused the relevant provisions of the law as also the judicial pronouncements, we are of the view that the High Court has not committed any error in not quashing the order

81 (2021) 2 SCC 670

passed by the learned Magistrate and not quashing the criminal proceedings for the offences under Sections 379 and 414. It is required to be noted that the learned Magistrate in exercise of the suo motu powers conferred under Section 156(3) CrPC directed the In-charge/SHO of the police station concerned to lodge/register the crime case/FIR and directed initiation of investigation and directed the In-charge/SHO of the police station concerned to submit a report after due investigation.

13. Applying the law laid down by this Court in the cases referred to hereinabove, it cannot be said that at this stage the learned Magistrate had taken any cognizance of the alleged offences attracting the bar under Section 22 of the MMDR Act. On considering the relevant provisions of the MMDR Act and the Rules made thereunder, it cannot be said that there is a 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.

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15. As specifically observed by this Court in *AnilKumar* [*AnilKumar* v. *M.K. Aiyappa*, (2013) 10 SCC 705 : (2014) 1 SCC (Cri) 35] , when a Special Judge refers a complaint for investigation under Section 156(3) CrPC, obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage.

16. Even as observed by this Court in *R.R. Chari* [*R.R. Chari* v. *State of U.P.*, 1951 SCC 250 : AIR 1951 SC 207] , even the order passed by the Magistrate 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. As observed by the Constitution Bench of this Court in *A.R. Antulay* [*A.R. Antulay* v. *Ramdas Sriniwas Nayak*, (1984) 2 SCC 500 : 1984 SCC (Cri) 277] , filing of a complaint in court is not taking cognizance and what exactly constitutes taking cognizance is different from filing of a complaint. Therefore, when an order is passed by the Magistrate for investigation to be made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case, when such an

> order is made the police is obliged to investigate the case and submit a report under Section 173(2) of the Code. That thereafter the investigating officer is required to send report to the authorised officer and thereafter as envisaged under Section 22 of the MMDR Act the authorised officer as mentioned in Section 22 of the MMDR Act may file the complaint before the learned Magistrate along with the report submitted by the investigating officer and at that stage the question with respect to taking cognizance by the learned Magistrate would arise."
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> (emphasis added)

27. The learned Amicus Curiae has taken me to the other larger bench decisions of the Supreme Court to contend that the law declared in **Jayant**[82] was in consonance with the law laid down by the larger benches.

A.R. Anthulay v R.S. Nayak[83]

28. In this case, the Constitution Bench of the

82 (2021) 2 SCC 670
83 (1984) 2 SCC 500

Supreme Court deliberated on the issue of whether the Court of Special Judge set up under Section 6 of the Criminal Law Amendment Act, 1952 can take cognizance of any of the offences enumerated in Sections 6(1)(a) and 6(1)(b) upon a private complaint. The appellants contended that the Special Judge cannot entertain a private complaint as the non-compliance with the mandate of Section 5A of the P.C Act 1947 dealing with the safeguard against investigation would vitiate the proceedings, and an investigation under Section 5A is a condition precedent to taking cognizance of the offence. The respondents canvassed that the safeguard provided at the stage of investigation does not truncate the power of the Special Judge to take cognizance of the offence based on a private complaint. The Constitution Bench of the Supreme

Court enunciated that while conferring power on the Special Judge to take cognizance, the legislature had three opportunities to unambiguously state its mind whether cognizance can be taken on a private complaint or not and the disinclination of the legislature to provide points to the contrary indicates that no cannons of construction permit the Court to go in search of hidden or implied limitation on the power of the Special Judge to take cognizance.

29. The Constitution Bench[84] further observed thus:

> **"21.**The sheet-anchor of the submission was the decision of this Court in H.N. Rishbud and Inder Singh v. State of Delhi [AIR 1955 SC 196 : 1955) 1 SCR 1150 : 1955 Cri LJ 526] . In that case the question posed was whether the provision of Section 5-A of the 1947 Act requiring that the investigation into the offences specified therein shall not be conducted by any police officer of a rank lower than a Deputy Superintendent of Police

84 (1984) 2 SCC 500

without the specific order of a Magistrate, is directory or mandatory? The Court rendered the opinion that Section 5-A is mandatory and not directory, and that an investigation conducted in violation thereof bears the stamp of illegality. Thus so far as investigation of a case is concerned, this Court has recorded a definite opinion that investigation by a police officer in contravention of the provision contained in Section 5-A bears the stamp of illegality. What is the effect of this illegality on the outcome of a concluded trial does not arise for our consideration but there are certain observations which were relied upon to urge that a prior investigation under Section 5-A being held to be mandatory and as a Special Judge can take cognizance of an offence upon a police report submitted at the end of a valid and legal investigation in consonance with Section 5-A, by necessary implication, taking cognizance of an offence by a Special Judge under Section 8(1) of 1952 Act upon a private complaint is excluded. We must frankly say that we find nothing in this judgment even remotely to bear out the submission. Section 5-A is a safeguard against investigation by police officers lower in rank than designated officers. In this connection at p. 1159, the Court has observed as under:

> "The underlying policy in making these offences by public servants non-cognizable appears to be that public servants who have to discharge their functions—often enough in difficult circumstances—should not be exposed to the harassment of investigation against them on information levelled, possibly, by persons affected by their

> official acts, unless a Magistrate is satisfied that an investigation is called for, and on such satisfaction authorises the same. This is meant to ensure the diligent discharge of their official functions by public servants, without fear or favour. When, therefore, the Legislature thought fit to remove the protection from the public servants, in so far as it relates to the investigation of the offences of corruption comprised in the Act, by making them cognizable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a designated high rank…."

This observation will leave no room for doubt that the safeguard incorporated in Section 5-A is one against investigation by police officer of a rank lower than the designated rank and that the Magistrate can permit investigation by police officer of lower rank. It was however, urged that the three vital stages relevant to initiation of proceedings in respect of offences enumerated in Section 6(1)(*a*) and (*b*) have been clearly delineated in this judgment when at p. 1162 it is observed:"trial follows cognizance and cognizance is preceded by investigation". This is the basic scheme of the Code in respect of cognizable offences but that too where in respect of a cognizable offence, the informant approaches an officer in charge of a police station. When in the case of a cognizable offence, a police officer on receipt

of information of an offence proceeds under Chapter XII, he starts with investigation and then submits his report, called the police report, upon which cognizance is taken, and then follows the trial. And these three stages in that chronology are set out with regard to an investigation by an officer in charge of a police station or a police officer entitled to investigate any particular offence. This sentence cannot be read in isolation or torn out of the context to lend support to the submission that in no case cognizance can be taken without prior investigation under Section 5-A. In fact the Court proceeded to make it abundantly clear that "a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial". The Court examined the scheme of Sections 190, 193 and 195 to 199 of the Code of Criminal Procedure and observed : that "the language of Section 190 is in marked contrast with that of the other sections of the group under the same heading i.e. Sections 193 and 195 to 199. These latter sections regulate the competence of the court and bar its jurisdiction in certain cases excepting in compliance therewith, Section 190 does not". The Court concluded by observing "that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby". Having minutely read this judgment on which firm reliance was placed on behalf of the appellant, we find nothing in it to come to the

conclusion that an investigation under Section 5-A is a condition precedent before cognizance can be taken of offences triable by Special Judge. Reliance next was placed upon the decision of this Court in State of M.P.v.Mubarak Ali [AIR 1959 SC 707 : 1959 Supp (2) SCR 201 : 1959 Cri LJ 920] . This Court held that Section 5-A was inserted in the 1952 Act to protect the public servants against harassment and victimization. If it was in the interest of the public that corruption should be eradicated, it was equally in the interest of the public that honest public servants should be able to discharge their duties free from false, frivolous and malicious accusations. To achieve this object, Sections 5-A and 6 introduced the two safeguards : (1) no police officer below the rank of a designated police officer, shall investigate any offence punishable under Section 161, Section 165 or Section 165-A of the Penal Code, 1860 or under sub-section (2) of Section 5-A of the 1947 Act without the order of a Presidency Magistrate and (2) no court shall take cognizance of offences hereinabove enumerated except with the previous sanction, of the appropriate Government. The Court held that these statutory safeguards must be complied with, for they were conceived in public interest and were provided as a guarantee against frivolous and vexatious prosecutions. The Court further observed that the Legislature was prepared to believe an officer of an assured status implicitly, and it prescribed an additional guarantee that in the case of police officers below the rank, the previous order of

a Presidency Magistrate or a Magistrate of the first class as the case may be. Comes thereafter a pertinent observation "that the Magistrate's" status gives assurance to the bona fides of the investigation". This would rather show that Legislature while on the one hand conferred power on the police officers of the designated rank to take upon themselves the investigation of offences committed by public servants, it considered intervention of the Magistrate as the real safeguard when investigation was permitted by officers lower in rank than the designated officers. In other words, the Court was a safeguard and it ought to be so because the judicially trained mind is any day a better safeguard than any police officer of any rank. In State of U.P.v.Bhagwant Kishore Joshi [AIR 1964 SC 221 : (1964) 3 SCR 71 : (1964) 1 Cri LJ 1140] the observation of the Court in Mubarak Ali case [*AIR 1968* SC 1292 : (1968) 3 SCR 563 : 1964 1 Cri LJ 1484] was affirmed. In S.N. Bose v.*State of* Bihar*[(1970) 1 SCC* 595 : AIR 1971 SC 520 : (1970) 3 SCR 931] this Court held that the order of the Magistrate giving permission to the Inspector of Police to investigate the case did not give any reasons and there was thus a violation of Section 5-A. Yet this illegality committed in the course of an investigation does not affect the competence and jurisdiction of the court for trial and where cognizance of the case has in fact been taken and the case has proceeded to termination the invalidity of the preceding investigation does not vitiate the result unless the miscarriage of justice has been caused thereby, and in reaching this conclusion

reliance was placed on the case of H.N. Rishbud [AIR 1955 SC 196 : 1955) 1 SCR 1150 : 1955 Cri LJ 526] . In P. Sirajuddin v. State of Madras [AIR 1957 MB 43 : 1957 Cri LJ 184] it was held that the Code of Criminal Procedure is an enactment designed inter alia to ensure a fair investigation of the allegations against a person charged with criminal misconduct. This is undeniable but has hardly any relevance. Some guidance is given to the enquiry officer and the means to be adopted in investigation of offences. This has no bearing on the issue under discussion. Reference was also made to Union of India v. Mahesh *Chandra [AIR* 1957 *MB 43 : 1957* Cri LJ 184] which does not advance the case at all. Having carefully examined these judgments in the light of the submissions made, the only conclusion that unquestionably emerges is that Section 5-A is a safeguard against investigation of offences committed by public servants, by petty or lower rank police officer. It has nothing to do directly or indirectly with the mode and method of taking cognizance of offences by the Court of Special Judge. It also follows as a necessary corollary that provision of Section 5-A is not a condition precedent to initiation of proceedings before the Special Judge who acquires power under Section 8(1) to take cognizance of offences enumerated in Section 6(1)(a) and (b), with this limitation alone that it shall not be upon commitment to him by the Magistrate.

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31. It was then submitted that if the object underlying 1952 Act was to provide for a more speedy trial of offences of corruption by a public servant, this laudable object would be thwarted if it is ever held that a private complaint can be entertained by a Special Judge. Developing the argument it was pointed out that assuming that a private complaint is maintainable before taking cognizance, a Special Judge will have to examine the complainant and all the witnesses present as enjoined by Section 200. The Judge thereafter ordinarily will have to postpone issue of process against the accused, and either inquiry into the case himself or direct an investigation to be made by a police officer and in cases under the 1947 Act by police officers of designated rank for the purpose of deciding whether or not there is sufficient ground for proceeding. [Section 202(1)]. If the Judge proceeds to hold the inquiry himself, he is obliged to take evidence on oath but it was said that if the Court of Special Judge is a Court of Session, the case would be governed by proviso to sub-section (2) of Section 202, CrPC and that therefore, he will have to call upon the complainant to produce all his witnesses and examine them on oath. This would certainly thwart a speedy trial was the apprehension disclosed and therefore, it was said that there is internal contra-indication that a private complaint is not maintainable. We find no merit in the submission. As has been distinctly made clear that a Court of Special Judge is a Court of original criminal jurisdiction and that it can take cognizance of an offence in the manner

hereinbefore indicated, it may be that in order to test whether the complaint disclosed a serious offence or that there is any frivolity involved in it, the Judge may insist upon holding an inquiry by postponing the issue of process. When a private complaint is filed, the court has to examine the complainant on oath save in the cases set out in the proviso to Section 200 CrPC. After examining the complainant on oath and examining the witnesses present, if any, meaning thereby that the witnesses not present need not be examined, it would be open to the court to judicially determine whether a case is made out for issuing process. When it is said that court issues process, it means the court has taken cognizance of the offence and has decided to initiate the proceeding and as a visible manifestation of taking cognizance, process is issued which means that the accused is called upon to appear before the court. This may either take the form of a summons or a warrant, as the case may be. It may be that after examining the complainant and his witnesses, the court in order to doubly assure itself may postpone the issue of process, and call upon the complainant to keep his witnesses present. The other option open to the court is to direct investigation to be made by a police officer. And if the offence is one covered by the 1947 Act, the investigation, if directed, shall be according to the provision contained in Section 5-A. But it must be made distinctly clear that it is neither obligatory to hold the inquiry before issuing process nor to direct the investigation of the offence by police. The

matter is in the judicial discretion of the court and is judicially reviewable depending upon the material disclosed by the complainant in his statement under oath under Section 200, called in the parlance of criminal courts verification of the complaint and evidence of witnesses if any. It was however, urged that if Section 5-A can be dispensed with by holding that a private complaint is maintainable, the court at least should ensure pre-process safeguard by insisting upon the examination of all witnesses that the complainant seeks to examine and this will be counter-productive as far as the object of a speedy trial is concerned. Viewed from either angle, there is no merit in this submission. Primarily, examination of witnesses even at a pre-process stage by Special Judge is not on the footing that the case is exclusively triable by a Court of Session as contemplated by Section 202(2) proviso. There is no commitment and therefore, Section 202(2) proviso is not attracted. Similarly, till the process is issued, the accused does not come into the picture. He may physically attend but is not entitled to take part in the proceeding. (See:N*agawwa (smt)v.*Vee*ranna Shivalingappa Konjalgi[(*1976) 3 SCC 736 : 1976 SCC (Cri) 507 : AIR 1976 SC 1947]) Upon a complaint being received and the court records the verification, it is open to the court to apply its mind to the facts disclosed and to judicially determine whether process should or should not be issued. It is not a condition precedent to the issue of process that the Court of necessity must hold the inquiry as envisaged by Section 202 or

> direct investigation as therein contemplated. The power to take cognizance without holding inquiry or directing investigation is implicit in Section 202 when it says that the Magistrate may "if he thinks fit, postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer…, for the purpose of deciding whether or not there is sufficient ground for proceeding". Therefore, the matter is left to the judicial discretion of the court whether on examining the complainant and the witnesses if any as contemplated by Section 200 to issue process or to postpone the issue of process. This discretion which the court enjoys cannot be circumscribed or denied by making it mandatory upon the court either to hold the inquiry or direct investigation. Such an approach would be contrary to the statutory provision. Therefore, there is no merit in the contention that by entertaining a private complaint, the purpose of speedy trial would be thwarted or that a pre-process safeguard would be denied.
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> (emphasis added)

R.R.Chari v State of U.P.[85]

30. In **R.R. Chari v. State of U.P.**[86] the Three-Judge Bench of the Supreme Court, while considering the legality of the proceedings initiated against

85 AIR 1951 SC 207
86 ibid

the appellant therein on the ground that the prosecution of the appellant dehors sanction under Section 197 of the Cr.P.C. and Section 6 of the P.C. Act was invalid, it was held that the expression "cognizance" denotes the stage of initiation of proceedings against a public servant and the stage of investigation is different from cognizance. The Supreme Court took the view that the word "cognizance" is a word of somewhat different indefinite import and it is not always used in the same sense. The Court concluded that when the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections but for the purpose of investigation, he cannot be said to have taken cognizance.

Gopal Das Sindhi v. State of Assam and Another[87]

31. In **Gopal Das Sindhi v State of Assam and Another**[88], the three-Judge Bench of the Supreme Court laid down the proposition that if the Magistrate or the Court is shown to have applied the mind not for the purpose of taking action upon the complaint, but for taking some other kind of action contemplated under the Code of Criminal Procedure such as ordering investigation under Section 156 (3) or issuing a search warrant, he cannot be said to have taken cognizance of the offence.

H.N.Rishbud and Another v. State of Delhi[89]

32. In **H.N.Rishbud v. State of Delhi**[90], the Supreme Court laid down that the expression

87 AIR 1961 SC 986
88 ibid
89 AIR 1955 SC 196
90 ibid

'investigation' included the stages set out therein and the stage of investigation precedes the stage of cognizance, and the stage of trial follows cognizance.

State of Madhya Pradesh v. Mubarak Ali[91]

33. In **State of Madhya Pradesh v. Mubarak Ali**[92] the Supreme Court identified that the safeguards inserted in the P.C. Act under Section 5 of the Act intended to protect honest public servants against harassment and victimisation, and Section 5A is a safeguard against investigation, and Section 6 of the Act, a safeguard prior to the court taking cognizance of the offence.

34. The dictum laid down by the Supreme Court in **Jayant**[93] is also in tune with the law laid down

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91 AIR 1959 SC 707
92 ibid
93 (2021) 2 SCC 670

in **Dilawar Singh v. State of Delhi**[94], **Anju Chaudhary v. State of UttarPradesh**[95], **Krishna Pillai v. T.A. Rajendran**[96] and **Kishun Singh and Ors. v. State of Bihar**[97] to the effect that mere application of mind does not amount to taking cognizance, unless the Magistrate does so for proceeding under Sec.200.

The proposition in Jayant[98]

35. In **Jayant**[99] the Supreme Court laid down that a direction passed by a Magistrate ordering investigation under Section 156(3) of Cr.PC is not tantamount to taking cognizance. It is pertinent to note that in **Jayant**[100], the Supreme Court has referred to **AnilKumar**[101] the decision of the coordinate bench of the Supreme Court. The law laid

94 2007 12 SCC 641
95 (2013) 6 SCC 384
96 1990 (Supp) SCC 121
97 1993 (2) SCC 16
98 (2021) 2 SCC 670
99 ibid
100 Supra note.98
101 (2013) 10 SCC 705

down in **Jayant**[102] is in consonance with the law laid down by the Constitution Bench of the Supreme Court and the larger benches of the Supreme Court in the cases referred to above.

36. The learned Amicus Curiae further submitted that under the Scheme of the P.C Act, the expressions "Investigation" and "cognizance" in Section 17 and Section 19 of the P.C. Act denote two different and distinct stages. The learned Amicus Curiae submitted that Chapter IV of the P.C. Act deals with "investigation into cases under the Act", and Chapter V deals with "sanction for prosecution and other miscellaneous provisions."

37. The submission of the learned Amicus Curiae is that the law laid down by the Supreme Court in **Jayant**[103] is in tune with the integrated statutory

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102 (2021) 2 SCC 670
103 ibid

scheme of the PC Act 1988 and the Cr.P.C read conjointly with the precedents mentioned above. The learned Amicus Curiae submitted that before the introduction of Section 17-A in the PC Act 1988, Section 17 acted as a safeguard.

38. Referring to the definition of the expression "investigation" in the Cr.P.C and adverting to the import of the expression "cognizance" and other relevant provisions, the learned Amicus Curiae submitted that the expression "cognizance" deserves to be interpreted in the context of steps for prosecuting the accused.

39. The expression "investigation" is defined in Section 2 (h) of the Cr.P.C as follows:

> "Investigation to include all the proceedings under the Code for collection of evidence conducted by the police officer or other persons other than a magistrate who is authorized by the Magistrate in this behalf."

40. The learned Amicus Curiae submitted that the expression "cognizance" cannot be construed as encompassing the stage of investigation under the scheme of the P.C Act and the Cr.P.C. The learned Amicus Curiae also submitted that if the expression "cognizance" is construed as encompassing the stage of investigation, the non-compliance with the mandatory safeguard extended by the P.C Act at the stage of investigation would necessarily vitiate the trial. The learned Amicus Curiae, referring to the proposition laid down by the Supreme Court in **H.N.Rishbud and Another v. State of Delhi**[104]**, State of Madhya Pradesh v. Mubarak Ali**[105] and **A.R. Anthulay v R.S. Nayak**[106]**,** submitted that non-compliance with the mandatory safeguard extended by

104 AIR 1955 SC 196
105 AIR 1959 SC 707
106 (1984) 2 SCC 500

the PC Act, would not vitiate the stage of cognizance and trial.

41. The expression “cognizance” is not defined either under the P.C. Act or the Cr.PC. It is to be understood that the intention of the legislature not to define the expression "cognizance" in the scheme is a conscious step as the meaning of the expression is contextual and varies as per the context in which the expression is incorporated as held by the Apex Court in various decisions. As mentioned above, sanction for prosecution is dealt with in chapter V of the P.C Act. The heading of Chapter V of the P.C Act is “Sanction for prosecution and other miscellaneous provisions”, and the introductory caption to Section 19 (which comes under Chapter V) reads as “previous sanction necessary for prosecution”.

42. The recurrent incorporation of the expression "prosecution" persistently in Chapter V and in the relevant section signifies that the legislature has used the expression "cognizance" in the context of the Court setting in motion the steps to prosecute the accused.

43. The recurrence of the expression "prosecution", as mentioned above, reflects the context in which the expression “cognizance” is used under the scheme of the P.C. Act. It is necessary to conclude that the expression "cognizance" thus deserves to be interpreted in the context of proceeding with the steps for prosecuting the accused.

44. Even assuming that while passing an order for investigation under Section 156 (3) of the Cr.P.C, the Magistrate is bound to apply his

mind to the complaint, such degree of application of mind is only for the limited purpose of determining the sufficiency of the materials before him and for appreciating whether it is necessary to gather more materials for determining at a later stage whether to initiate judicial proceedings or not. The application of mind to the complaint other than for the purpose of initiating a proceeding for prosecution does not amount to taking cognizance in the context of Section 19 of the P.C.Act.

45. At the stage of investigation, there is no application of mind for the purpose of initiating proceedings under Sections 200 to 204 of the Cr.P.C. Therefore, application of mind to the complaint for any purpose other than for the purpose of initiating judicial proceedings under Sections 200 to 204 is not tantamount to taking

cognizance. When a Magistrate applies his mind to the complaint for the purpose of ordering an investigation, there is no application of mind for the purpose of proceeding under Sections 200 to 204 of the Cr.P.C. The expression "cognizance" denotes the judicious application of mind by the Magistrate for initiating judicial proceedings for the purpose of Sections 200 to 204 of the Cr.P.C.

46. The frames of Chapters XIV and XV of the Cr.PC also indicate that the expression "cognizance" is not intended to include the stage of investigation.

47. The materials collected by a police officer through the process of investigation and referred to in the police report is only one among the various statutory foundations for taking cognizance, and therefore, this is an indication

that the stage of investigation denotes a stage preceding cognizance. The Magistrate taking cognizance of an offence under Chapter XV of the Cr.P.C only based on the complaint is required to examine the complainant and the witnesses present. Application of mind by the Magistrate to the offence by examining the complainant and witnesses denotes the stage of taking cognizance. Even if the Police report after investigation is to the effect that no case is made out, the Magistrate is competent to take cognizance if offences are made out. The degree of application of mind at the time of taking cognizance of the offence is different from the degree of application of mind for the limited purpose of determining whether the complaint is to be referred for investigation or not.

48. **The course to be adopted by the High Court when faced with judgments of the Supreme Court laying down propositions which are at variance with each other.**

The following principles emerge from the decisions of the Supreme Court and a Full Bench decision of this Court in the circumstances mentioned above:-

(1) When the proposition laid down by a Larger Bench of the Supreme Court is at variance with the law laid down by the smaller Benches, the law as declared by the Larger Bench of the Supreme Court deserves to be followed in preference to the law declared by the smaller Bench (**Union of India v. K.S. Subramanian**[107])

(2) When there is divergence in the law declared by the co-ordinate benches of the Supreme

107 AIR 1976 SC 2433

Court, and when the subsequent judgment refers to the earlier judgment and lays down a proposition at variance with the earlier judgment, the High Court is bound to follow the law laid down in the subsequent Judgment (**Raman Gopi v. Kunju Raman Uthaman**[108])

(3) In cases where, in a subsequent decision, the Supreme Court considers the earlier decisions and distinguishes the earlier decision, the subsequent decision of the Supreme Court is binding on the High Court (**Gregory Patrao v. Manglore Refinary & Petrochemicals**[109]).

(4) When the High Court is confronted with divergent views declared by the Supreme Court, the High Court is duty-bound to adjudicate the case on its own interpretation of the judgment, keeping in

108 2011 (4) KLT 458 (FB)
109 2022 10 SCC 461

mind the following principles:-

(a) The Court should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation.

(b) The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided.

(c) Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex-cathedra statement having the weight of authority. (**Indian Petro Chemicals v. Shramik Sena**[110], **Divisional Controller, KSRTC v. Mahadeva Shetty and**

110 (2001) 7 SCC 469

Anr[111].)

Application of the principle in the context of the law declared in Jayant[112] **and AnilKumar**[113]**.**

49. In **Jayant**[114] the Two- Judge Bench of the Supreme Court, after adverting to the Constitution Bench judgment in **A.R. Antulay v. R.S. Nayak**[115], and the judgments rendered by the larger benches laid down the proposition that an order directing investigation does not amount to taking cognizance. The co-ordinate Bench in **Jayant**[116] has expressly referred to the law laid down in **AnilKumar**[117] and even attempted to clarify that when a Special Judge refers a complaint for investigation, obviously, he has not taken cognizance of the offence and it is a

111 (2003) 7 SCC 197
112 (2021) 2 SCC 670
113 (2013) 10 SCC 705
114 Supra note.112
115 (1984) 2 SCC 500
116 Supra note.112
117 Supra note.113

pre-cognizance stage, and not a post-cognizance stage." In **Jayant**[118] based on the above conclusion the Supreme Court held that the bar under Section 22 of the MMDR Act against taking cognizance does not operate as an embargo for directing an investigation under Section 156(3) Cr.P.C, as an order directing investigation, does not amount to taking cognizance.

50. In **AnilKumar**[119], after reckoning that when the Special Judge directs an investigation, the Magistrate has not taken cognizance of the offence, the Supreme Court held that the Magistrate cannot order investigation under Section 156(3) Cr.P.C without securing sanction under Section 19 of the P.C Act 1988. It is important to note that in **Jayant**[120], the co-ordinate Bench of the Supreme

118 (2021) 2 SCC 670
119 (2013) 10 SCC 705
120 Supra note. 118

Court noticed the said difference between the underlying principle laid down in **AnilKumar**[121] and its application in **AnilKumar**[122] and reconciled the ratio in **AnilKumar**[123] with the ratio expressed by the Constitution Bench and the Larger Benches of the Supreme Court.

51. In view of the law laid down by the Supreme Court in **Gregory Patrao**[124] this Court is bound to apply the law as clarified by the subsequent Judgment.

Anupama T.V. & Ors v. State of Kerala & Ors[125]

52. In **Anupama T.V. & Ors v. State of Kerala & Ors**[126], a learned Single Judge of this Court followed the ratio laid down in **Jayant**[127] and held

121 (2013) 10 SCC 705
122 ibid
123 Supra note.121
124 2022 10 SCC 461
125 2021 KHC 254
126 ibid
127(2021) 2 SCC 670

that the order of the Court directing an enquiry under Section 202 makes it clear that the Court had not made up its mind to issue process against the accused and sanction under Section 197 of the Code can be insisted only at the time of issuing process against the accused under Section 204 of the Cr.PC.

53. As the judgment of the Supreme Court in **Jayant**[128] is subsequent to the judgment in **Muhammed**[129] and since the ratio laid down therein has been followed by this Court as the latest expression of law by the Supreme Court, the issue whether the dictum laid down by the Division Bench of this Court in **Muhammed**[130] continues to govern the field in view of **Jayant**[131] deserves to be reconsidered authoritatively by a Larger Bench.

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128 (2021) 2 SCC 670
129 2019 (1) KLT 156
130 ibid
131 Supra note.128

Applicability of the ratio laid down in AnilKumar[132] post amendment of the P.C.Act

54. The Judgment in **AnilKumar[133]** was rendered when Section 17-A was not part of the statute, and hence, that judgment cannot be taken as a precedent qua the P.C. Act as amended by Act 16 of 2018.

55. The amendment of the P.C. Act now explicitly provides two distinct safeguards, one under Section 17-A and the other under Section 19 of the P.C. Act. Section 17-A refers to approval from the concerned authority at the stage of investigation, and Section 19 deals with sanction at the stage of cognizance.

56. Section 17-A of the P.C. Act reads thus:-

> **"17-A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official**

132 (2013) 10 SCC 705
133 ibid

functions or duties.

No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval-
(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;
(b)in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;
(c)in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

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

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

57. Section 19 reads thus:

"19. Previous sanction necessary for prosecution.

(1)No Court shall take cognizance of an offence punishable under sections 7, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,

(a)in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b)in the case of a person [who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of a State and is not removable from his office save by or with sanction of the State Government, of that Government;

(c)in the case of any other person, of the authority competent to remove him from his office.[Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section, unless-
(i)such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and

(ii)the court has not dismissed the complaint under section 203 of the Code of Criminal Procedure, 1973 and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding:

Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the

concerned public servant:

Provided also that the appropriate Government or any competent authority shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt:

Provided also that in case where, for the purpose of grant of sanction for prosecution, legal consultation is required, such period may, for the reasons to be recorded in writing, be extended by a further period of one month:Provided also that the Central Government may, for the purpose of sanction for prosecution of a public servant, presecribe such guidelines as it considers necessary.

Explanation. - For the purposes of sub-section

(1), the expression "public servant" includes such person-

(a)who has ceased to hold the office during which the offence is alleged to have been committed; or

(b)who has ceased to hold the office

during which the offence is alleged to have been committed and is holding an office other than the office during which the offence is alleged to have been committed.]

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

(3)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;

(b)no Court shall stay the proceedings

under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

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

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

Explanation. For the purposes of this section,

(a)error includes competency of the authority to grant sanction;

(b)a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or

> with the sanction of a specified person or any requirement of a similar nature."

58. The safeguard extended by Section 17-A of the P.C Act 1988 is available only to the acts arising from recommendations made or "decisions taken by public servants". However, the safeguard at the stage of cognizance is not restricted to recommendations/decisions made by a public servant.

59. Section 17-A of the P.C Act 1988 imposes prohibition only on a police officer from conducting any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under the Act without the previous approval of the prescribed authority and the bar therein operates only when the offence allegedly committed by a public servant relates to any recommendation made or decision taken by such

public servant in discharge of his official functions. Section 17-A of the Act cannot be considered as offering a protective shield for a corrupt public servant. Once a constitutional court examines and satisfies itself about the necessity of the enquiry or the investigation into the alleged crime, the requirement of approval by the competent authority is substituted by judicious determination {Vide : Shankara Bhat v. State of Kerala[134], Venugopal V. v. State of Kerala and Ors.[135], Jayaprakash.J v. State of Kerala[136] Anil Vasantrao Deshmuk v State of Maharashtra & Ors.[137], Kavindra Kiyawat v. State of M.P. and Ors.[138], Hemant Nimbalkar v. State of

134 2021 (4) KLJ 212
135 2021 (5) KLT 287
136 2022 (1) KHC 206
137 2021 SCC Online Bom 1192
138 MANU/MP/1150/2020

Karnataka and Ors.[139] and Kailash Chandra Agarwal And Ors. v. State Of Rajasthan[140]}.

60. In **State of Telangana v. Managipet @ Mangipet Sarveshwar Reddy**[141] and **State of Rajasthan v. Tejmal Choudhary**[142], the Supreme Court laid down that there is no room for ambiguity that Sections 17-A and 19 incorporated by the 2018 amendment are liable to be applied prospectively and the amended provision would govern the complaint or FIR, registered after the amendment came into force.

61. The reflections from Sections 17-A and 19 of the P.C. Act 1988 are that :-

(i) The interdiction in terms of Section 17-A operates qua a police officer.

(ii) The operation of safeguard against

139 MANU/KA/0842/2021
140 MANU/RH/0751/2020
141 2019 (19) SCC 87
142 2021 SCC OnLine SC 3477 : 2022 (2) KHC 49(SC)

investigation under Section 17-A is only limited to recommendations made and decisions taken by the public servant in the discharge of his official function.

(iii) The legislature has consciously made a distinction to the relevant expressions in Sections 17-A and 19 of the P.C. Act in the sense that the legislature has deemed it fit to insist on “approval” at the stage of investigation, whereas it insisted the expression "sanction" in Section 19 of the P.C. Act.

(iv) If the legislature perceived the expression "cognizance" in Section 19 as including the stage of investigation, there was no reason to introduce a separate safeguard under Section 17-A of the Act.

(v) The statement of object and reasons for the

2018 amendment of Section 19 explain that Section 19 (1) (ii) was inserted with the object of indicating explicitly the stage at which sanction was required to be sought.

(vi) By incorporating Section 19(1) (ii), the legislature appears to have expressly stated its earlier implicit intention that the expression "cognizance" derives its true meaning from the context in which it was used earlier, i.e., "prosecution" an expression which is recurrently employed in Chapter V and Section 19 to denote the context in which sanction under Section 19 of the Act is required.

Baini Prasad Chansoriya v. State of M.P and Ors.[143]

62. In **Baini Prasad Chansoriya v. State of M.P and Ors.**[144], the High Court of Madhya Pradesh

143 2022 SCC OnLine MP 5991 : ILR 2023 MP 703
144 ibid

considered the issue of whether the law laid down in **AnilKumar**[145] will govern the stage of investigation after incorporation of Section 17-A of the P.C. Act. The Court considered a case where the Special Judge had rejected an application for investigation under Section 156(3) of the Cr.P.C. The High Court of Madhya Pradesh was called upon to consider the issue of whether the law laid down by the Supreme Court in **AnilKumar**[146] would be applicable to an application for investigation filed post amendment of the P.C. Act. The Division Bench of the Madhya Pradesh High Court observed thus:-

> "9. The decision in AnilKumar (supra) does not lay down the law in respect of Section 17-A of PC Act. Pertinently, the preamended PC Act extended protection of sanction to public servants only once i. e. at

145 (2013) 10 SCC 705
146 (2013) 10 SCC 705

the stage of taking cognizance of the offence by trial Court but not at pre-cognizance stage. However, the protection of sanction at the pre-cognizance stage was made available by means of purposive interpretation by the judicial verdict in AnilKumar (supra). Insertion of Section 17-A in PC Act w.e.f. 26.07.2018, protection at the precognizance stage became statutorily available. Therefore, to ascertain the extent and sweep of the protection and prohibition prescribed at pre-cognizance stage by Section 17- A, the words and phrases employed therein will alone have to be looked into.

9.1 On coming into effect of Section 17-A from 26.07.2018, the statutory prohibition became operational but only against the police to conduct any enquiry/inquiry/investigation into any offence of the nature contemplated by Sec. 17-A, unless approval for doing so is obtained from authority competent to remove the accused.

9.2 Thus, the textual interpretation of Section 17A reveals in clear terms that the statutory bar to

conduct enquiry/ inquiry/ investigation, without approval, is against Police Officer but not against the Court.

9.3 It is thus clear that neither enquiry (informal enquiry as contemplated in para 120 (ii), (v), (vi) & (vii) of Apex Court's decision in Lalita Kumari Vs. Govt. of U.P. & Ors (supra) nor inquiry (formal inquiry as defined in Sec.2(g) of Cr.PC) nor investigation can be conducted by Police Officer in the absence of grant of approval by the competent authority. Therefore, on receipt of complaint, containing allegation of commission of offence under PC Act arising from allegation of "recommendation made" or "decision taken" by a public servant, a Police Officer is statutorily prohibited from conducting enquiry/ inquiry/ investigation unless approval is obtained from competent authority u/S. 17-A.

9.4 Importantly the statutory prohibition u/S 17-A against the Police Officer does not restrict the Special Court from entering into the realm of enquiry/inquiry which may be necessary prior to registration

of offence even in the absence of approval from competent authority u/S 17-A.

9.5 However, the extent of enquiry/inquiry which a Special Court can conduct in the absence of approval is merely to achieve the object of ascertaining whether contents of Section 156(3) application prima facie reveal commission of offence of the nature contemplated u/S 17-A and punishable under PC Act or not.

9.6 If the Special Court finds that 156(3) application reveals commission of offence of nature contemplated by Section 17-A of PC Act, then before the next step of directing police to submit report or to register offence or to conduct enquiry can be given, approval as sine qua non ought to be obtained from competent authority u/S 17-A.

9.7 Responsibility of obtaining approval from the competent authority u/S. 17-A lies on the shoulders of the complainant who prefers the application 156(3) Cr.P.C.

9.8 However, in view of 2nd proviso to Section 17-A, if the approval is

not granted by the competent authority within three months extendable by one month, the complainant is not left remedyless. The complainant can very well approach the superior court for seeking appropriate writ/direction.

10. The aforesaid steps taken by Special Court on an application u/S 156(3) Cr.PC alleging offences under PC Act arising from acts of recommednation made or decision taken will not run contrary to the decision of Apex Court in AnilKumar (supra). Reasons for this are not far to see.

10.1 The first being that the verdict in AnilKumar (supra) was rendered during pre-amendment era when Section 17-A was not part of the Statute Book and thus is not a precedent qua Sec.17-A PC Act.

10.2 Secondly, the legislature w.e.f. 26.07.2018 created a new provision in shape of Section 17-A PC Act extending additional protective umbrella against false and malicious prosecution qua offences punishable under PC Act arising from “recommendation made” or “decision taken” by public servant in discharge of official

functions/duties. In the preamendment era, Section 19 of PC Act was the only provision extending protective umbrella to public servants which was available in respect of all kinds of offences under PC Act, but only at the stage when Court takes cognizance after investigation is complete.

10.3 Secondly, the statutory prohibition u/S 17-A binds the hands of Police from conducting enquiry/inquiry/investigation sans approval. Such prohibition was not statutorily prescribed prior to 26.07.2018 Therefore, the true import of Sec.17-A can be derived from textual and contextual interpretation of this provision alone without the aid of AnilKumar (supra).

10.4 Thirdly, Sec. 17-A does not bar the Special Court from conducting enquiry or inquiry (as defined in Sec. 2(g) Cr.P.C.). Argument may be raised that though Special Court is not statutorily barred from conducting enquiry/inquiry but occasions may arise where the Special Court for aid and assistance may direct Police to conduct enquiry/inquiry leading to an

impasse in the face of statutory bar u/S.17-A prohibiting Police Officer from proceeding ahead. True it is that Police Officer alone has been restrained from conducting enquiry/inquiry/investigation but the said argument can be put to rest by the well established principle of law that what cannot be done directly in law also cannot be done indirectly. [See: Gian Singh Vs. State of Punjab and another, (2010) 15 SCC 118 Para 7). Therefore, the enquiry/inquiry can very well be conducted u/S. 17-A by Special Court but without involving the police. The Special Court is thus not prevented from conducting enquiry/inquiry at its own level while dealing with an application u/S. 156(3) Cr.P.C. but without assistance of the police. In this manner, the sweep, extent and object of Sec. 17- A remains unoffended.

10.5 Thus, the verdict of AnilKumar (supra) will not come in the way of trial Court while deciding an application u/S 156(3) Cr.P.C. for the reason of AnilKumar (supra) not being the law qua Sec. 17A and also that the legal bar contained therein restrains the Police but not the Court. Moreso, the decision in

AnilKumar (supra) has been doubted by Apex Court in Manju Surana (supra) inter alia for the reason of AnilKumar (supra) failing to consider three - Judge Bench verdict in R.R. Chari Vs. State of U.P., (AIR 1951 SC 207) wherein the Apex Court profitably quoted its earlier verdict in Subramanian Swamy Vs. Monmohan Singh and another, 2012 (3) SCC 64. Pertinently Subramanian Swamy (supra) at para 35, extracts the Three Judge Bench decision in R.R. Chari (supra) which is reproduced as follows:-

> 35. In R. R. Chari v. State of U.P., the three Judge Bench approved the following observations made by the Calcutta High Court in Superintendent and Remembrancer of Legal Affairs Vs. Abni Kumar Banerjee (supra):
>
> "What is taking cognizance has not been defined in the Criminal Procedure Code, and I have no desire now 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."
>
> [Emphasis Supplied]

10.6 Thus, non-consideration of R.R. Chari (Three – Judge Bench decision) in AnilKumar (Two- Judge Bench

> decision) impelled the Apex Court in Manju Surana to doubt the precendential value AnilKumar before referring the case to larger Bench.
>
> 10.7 Reverting to the factual matrix attending the present case, it is seen that learned Special Judge rejected the application u/S. 156(3) without conducting any enquiry or inquiry (as defined u/S2(g) Cr.P.C.) for at-least coming to a tentative view that the application u/S. 156(3) contains allegations which reveal commission of cognizable offence punishable under PC Act or not arising from decision taken or recommendation made. Thus reliance placed by learned Special Judge on the decision of AnilKumar (supra), for the reasons mentioned (supra) is misplaced."
>
> (emphasis added)

63. It was in the post amendment era a Division Bench of this Court considered **Muhammed**[147]**.** But the applicability of the ratio in **AnilKumar**[148] to the amended P.C Act was never considered in **Muhammed**[149]**.**

147 2019 (1) KLT 156
148 (2013) 10 SCC 705
149 Supra note.147

Therefore, this Court is of the view that the matter may be placed before an appropriate Bench for an authoritative pronouncement on the questions involved.

64. This Court finds that the following issues deserve consideration by a Bench of two Judges:

(a) When the Hon'ble Supreme Court has in **Jayant**[150] referred to the proposition laid down in **AnilKumar**[151] and laid down a dictum that an order directing investigation is not tantamount to taking cognizance, whether it is possible to construe sanction under Section 19 of the P.C. Act as a pre-requisite for passing a direction for investigation under Section 156(3) of the Cr.P.C overlooking that the law laid down by the Supreme Court in **Jayant**[152] aligns with the ratio laid down by the Constitution

150 (2021) 2 SCC 670
151 (2013) 10 SCC 705
152 Supra note.150

Bench and Larger Benches of the Supreme Court.

(b) Whether the law laid down by the Division Bench of this Court in **Muhammed**[153] that pending adjudication of the reference made by the Supreme Court in **Manju Surana**[154], this Court is bound to follow the law laid down by the Supreme Court in **AnilKumar**[155] continues to be a binding law in the light of the subsequent judgment of the Supreme Court in **Jayant**[156] wherein the Supreme Court has laid down the proposition that an embargo on taking cognizance imposed by the statute does not impede investigation.

(c) Whether the ratio laid down in **AnilKumar**[157] is applicable to cases, post amendment of the P.C Act (vide: Act 16 of 2018), when by inserting

153 2019 (1) KLT 156
154 (2018) 5 SCC 557
155 (2013) 10 SCC 705
156 (2021) 2 SCC 670
157 Supra note.155

Section 17-A and Section 19 (1) (ii) to the P.C. Act, the legislature has expressly conveyed its otherwise implicit intent to treat the stage of the investigation as different from the stage of cognizance for the purpose of the P.C. Act.

(d) Whether the expression "cognizance" in Section 19 of the P.C Act is liable to be construed bearing in mind that the said expression derives its meaning from the context expressly referred therein, i.e.,"prosecution".

65. The Registry is directed to place the papers before the Hon'ble the Chief Justice for being placed before a Bench of two Judges for an authoritative pronouncement on the issues raised.

I place on record my appreciation for the invaluable contribution and assistance rendered by the learned Amicus Curiae, Sri.M.K.Sreegesh.

Sd/-
K.BABU
JUDGE

AS/TKS