

(2014) 03 PAT CK 0065
In the Patna High Court
Case No : Cr. Writ No. 1126 of 2013

Ahmad Ashfaque Karim

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 05-03-2014

Acts Referred:

Arms Act, 1959 — Section 25(1-B) A, 25(1-B)(a), 25(1-B)A, 26, 30
Bihar Conduct of Examination Act, 1981 — Section 10
Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 136, 14, 15, 16, 226
Criminal Procedure Code, 1973 (CrPC) — Section 154, 155(2), 155(3), 156, 156(1)
Penal Code, 1860 (IPC) — Section 120-B, 353, 384, 406, 409
Prevention of Corruption Act, 1988 — Section 10, 13, 13(1)(d), 13(2), 15
Representation of the People Act, 1951 — Section 81
Terrorist and Disruptive Activities (Prevention) Act, 1985 — Section 20(7)

Citation : (2015) 1 PLJR 178

Hon'ble Judges : S.P. Singh, J; I.A. Ansari, J

Bench : Division Bench

Advocate : Khursid Alam, Advocates for the Appellant; Devendra Kumar Sinha, Prabhu Narayan Sharma and Alok Kumar Rahi, Advocates for the Respondent

Judgement

I.A. Ansari, J.—Where do we draw the discernible line between the jurisdiction under Section 167(2) of the Code of Criminal Procedure and that under Section 309 of the Code of Criminal Procedure, what are the modes of taking cognizance, when can a Court is said to have taken cognizance and what are the factors which govern the taking of cognizance, are some of the questions which this writ petition raises. Yet another question of immense importance, which the present writ petition has raised, is: Without taking cognizance of any offence under the Prevention of Corruption Act, 1988, whether a Special Judge, appointed under the provisions of the Prevention of Corruption Act, 1988, has the jurisdiction to take cognizance of any offence under the Indian Penal Code and/or under a special law, other than the Prevention of Corruption Act, 1988? The answer to the queries, posed above, would decide the fate of the petitioner's further

detention in Custody. This writ petition, made under Article 226 of the Constitution of India, has put to challenge the order, dated 11.9.2013, and orders passed subsequent thereto, in Special Case No. 32 of 2013, arising out of Shastrinagar Police Station Case No. 213 of 2013, by learned Special Judge, Vigilance-I, Patna, taking cognizance of offences under Sections 384, 353, 406, 420, 467, 468, 469 and 471 read with Section 120-B of the Indian Penal Code and also under Section 10 of Bihar Conduct of Examination Act, 1981, coupled with Sections 25(1-B)A, 26 and 30 of the Arms Act, 1959, and further under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, seeking issuance of a writ, in the nature of certiorari, quashing the impugned order, dated 11.9.2013, and orders passed subsequent thereto, and in, consequence thereof, seeking issuance of a writ, in the nature of habeas corpus, directing release of the accused-petitioner from custody forthwith.

2. We have heard Mr. Khursid Alam, learned Counsel for the accused-petitioner, and Mr. Devendra Kumar Sinha, learned Additional Advocate General, appearing on behalf of the respondents. We have also heard Mr. Ajay Kumar Thakur, learned Advocate as Amicus Curiae.

Background Facts:

3. The material facts, giving rise to the present writ petition, may, in brief, be set out as under:--

"(i) Following registration of Shastrinagar Police Station Case No. 213 of 2013, on 15.6.2013, under Sections 384, 353, 406, 420, 467, 468, 469 and 471 read with Section 120-B of the Indian Penal Code, under Section 10 of Bihar Conduct of Examination Act, 1981, under Section 25(1-B) A of the Arms Act, 1959, and under Section 5 of the Prevention of Corruption Act, 1988, the accused-petitioner was arrested on 15.6.2013 and, on his production, on 16.6.2013, before the learned Special Judge, Vigilance-I, Patna, constituted under Section 3 of the Prevention of Corruption Act, 1988, learned Special Judge passed an order, on 16.6.2013, itself, remanding the accused-petitioner to custody. While fortnightly remand of the accused-petitioner continued from time to time, a charge-sheet was laid, on 11.9.2013, alleging commission of offences by accused-petitioner under Sections 384, 353, 406, 420, 467, 468, 469 and 471 read with Section 120-B of the Indian Penal Code, under Sections 7 read with 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, under Section 10 of the Bihar Conduct of Examination Act, 1981, and under Sections 25(1-B)A, 26 and 30 of the Arms Act, 1959.

(ii) On the very day of submission of charge-sheet (i.e. on 11.9.2013), learned Special Judge, passed an order taking cognizance of offences, inter alia, under Sections 384, 353, 406, 420, 467, 468, 469 and 471 read with Section 120-B of the Indian Penal Code, under Sections 7 read with 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, under Section 10 of Bihar Conduct of Examination Act, 1981, and under Sections 25(1-B)A, 26 and 30 of the Arms Act,

1959.

(iii) While the judicial remand of the accused-petitioner was to end on 18.9.2013, learned Special Judge passed an order remanding the accused-petitioner to custody. Thereafter, detention of the accused-petitioner has continued by virtue of various orders of remand passed by learned Special Judge without, however, any sanction having been received for prosecution of the offences under the Prevention of Corruption Act, 1988, though a sanction, as envisaged by Section 19 of the Prevention of Corruption Act, 1988, is, according to the accused-petitioner, a precondition for taking cognizance of any offence under the Prevention of Corruption Act, 1988, and for the accused-petitioner's prosecution under the Prevention of Corruption Act, 1988. The taking of cognizance by the learned Special Judge, in respect of offences under the various penal provisions of the Prevention of Corruption Act, 1988, is, thus, according to the petitioner, without jurisdiction and void ab initio.

(iv) Aggrieved by the fact that he has been continued to be remanded to custody by the learned Special Judge despite the fact that charge-sheet was submitted as far back as on 11.9.2013 and though no cognizance, according to the accused-petitioner, has really been taken under any of the penal provisions of the Prevention of Corruption Act, 1988, because of absence of sanction, the accused-petitioner has filed this petition, under Article 226 of the Constitution of India, seeking, as already indicated above, issuance of writs in the nature of certiorari as well as habeas corpus."

Submissions on behalf of the accused-petitioner

4. Appearing on behalf of the accused-petitioner, Mr. Alam, learned Counsel, has submitted that the impugned order, dated 11.9.2013, which stands specifically impugned in this writ petition, has several facets inasmuch as the learned Special Judge, in the initial part of the order, dated 11.9.2013, observed to the effect that he had taken cognizance of not only offences under Sections 384, 353, 406, 420, 467, 468, 469 and 471 read with 120-B of the Indian Penal Code, but also of offences under Sections 25(1-B)A, 26 and 30 of the Arms Act, 1959, and of offence under Section 10 of Bihar Conduct of Examination Act, 1981, coupled with Section-7 read with Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, later part of this order, i.e. order dated, 11.9.2013, shows that the learned Special Judge did take note of the fact that no sanction for prosecution of the accused-petitioner for any offence or offences under the Prevention of Corruption Act, 1988, had yet been granted and, having noticed this deficiency in the prosecution of the accused-petitioner, directed that requisite sanction be awaited for taking cognizance of offences under the Prevention of Corruption Act, 1988.

5. Thus, according to Mr. Alam, learned Counsel, the impugned order, dated 11.9.2013, suffers from complete non-application of mind inasmuch as the learned Special Judge, having, at the initial part of his order, dated 11.9.2013,

taken cognizance of offences under Sections 7 read with 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, has himself noted to the effect that since requisite sanction had not yet been received, taking of cognizance of various penal provisions under the Prevention of Corruption Act, 1988, was not permissible and, therefore, directed that the requisite sanction be awaited. In effect, thus, contends Mr. Alam, learned Counsel, no cognizance has been taken of any offence under the Prevention of Corruption Act, 1988, yet the accused-petitioner's remand to custody has been continued without the authority of law.

6. Elaborating his above contention, Mr. Alam, learned Counsel, has submitted that when cognizance under any of the penal provisions of the Prevention of Corruption Act, 1988, has not been taken by the learned Special Judge, taking of cognizance under the provisions of the Indian Penal Code or of the Arms Act, 1959, or of the offences under Bihar Conduct of Examination Act, 1981, was not permissible and is, therefore, not sustainable in law. On the strength of an order, such as, the order, dated 11.9.2013, further detention of the accused-petitioner has been, and would remain, submits Mr. Alam, wholly illegal and without jurisdiction.

7. It is the contention of Mr. Alam, learned Counsel, that taking of cognizance of an offence under the Prevention of Corruption Act, 1988, is a prerequisite for enabling a Special Judge to take cognizance of offence under the Indian Penal Code or any special law, other than Prevention of Corruption Act, 1988, and, in the present case, since the learned Special Judge has not, eventually, taken cognizance of any offence under the Prevention of Corruption Act, 1988, he could not have legally taken cognizance of any offence under the Indian Penal Code or the Arms Act, 1959, or Bihar Conduct of Examination Act, 1981, and the whole order, dated 11.9.2013, is, therefore, without jurisdiction, not sustainable and shall be treated as non-est in law.

8. It is also contended by Mr. Alam, learned Counsel, that in the absence of requisite sanction for prosecution of the accused-petitioner under the Prevention of Corruption Act, 1988, his continuous detention is wholly illegal and appropriate writ(s) needs to be issued setting aside and quashing the order, dated 11.9.2013, and all orders passed subsequent thereto setting at liberty the accused-petitioner.

9. In support of his submission that no cognizance of any offence under the Prevention of Corruption Act, 1988, can be taken without sanction as required under Section 19 of the Prevention of Corruption Act, 1988, Mr. Alam places reliance on the cases of R.S. Nayak Vs. A.R. Antulay, , Ashok Mehta and Another Vs. Ram Ashray Singh and Others, , Anil Kumar and Others Vs. M.K. Aiyappa and Another, , K. Kalimuthu Vs. State by D.S.P., , Md. Quasim Ansari v. State of Bihar, [2005(1) PLJR 527] and Dilawar Singh Vs. Parvinder Singh @ Iqbal Singh and Another, .

10. Contending also that when a charge-sheet is submitted, a remand, by

resorting to the power under Section 167(2) of the Code of Criminal Procedure, is not permissible inasmuch as it is Section 309(2) of the Code of Criminal Procedure, which, submits Mr. Alam, comes into play, when charge-sheet is filed. No detention, thereafter (i.e. upon submission of charge-sheet), is, according to Mr. Alam, permissible unless the Court takes cognizance of an offence, which a given Court is empowered to take cognizance of. Reference is made, in this regard, by Mr. Alam to the cases of Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and Another, , Sri S.K. Lal, Special Judge, C.B.I. (A.H.D.), Patna v. Lalu Prasad and Others, [1998(1) PLJR 783], Raradeo Mahto Vs. State of Bihar, and Bishwanath Ram Vs. The State of Bihar, .

Submissions on behalf of the Respondents:

11. Resisting the writ petition, at its threshold, learned Additional Advocate General, has submitted that a petition, under Article 226 of the Constitution of India, seeking issuance of a writ in the nature of habeas corpus or writ in the nature of certiorari is not maintainable in the factual background of the present case, when an alternative remedy, in the form of Section 482 of the Code of Criminal Procedure, is available to the accused-petitioner if the accused-petitioner is of the view that his detention in custody is without jurisdiction or wholly illegal as has been contended on behalf of the accused-petitioner.

12. It is the submission of the learned Additional Advocate General that in the facts of the present case, no sanction, as contemplated under Section 19(1) of the Prevention of Corruption Act, 1988, is necessary inasmuch as sanction, according to learned Additional Advocate General, would be required under Section 19(1) of the Prevention of Corruption Act, 1988, if an offence is committed, under the Prevention of Corruption Act, 1988, in discharge of his official duty by a public servant or in purported discharge of his official duty.

13. In the case at hand, submits the learned Additional Advocate General, since the accused-petitioner has allegedly committed offences, which cannot be described to have been committed, while discharging his duties or in purported discharge of his duties, sanction for his prosecution is not warranted. To strengthen these submissions, learned Additional Advocate General takes recourse to the provisions of Section 197 of the Code of Criminal Procedure.

Whether Section 482 of the Code of Criminal Procedure bars exercise of High Court's extraordinary jurisdiction under Article 226 or its exercise of superintendence as contained in Article 227 of the Constitution of India?

14. The question, which, now, arises for consideration, is: Whether the impugned order, dated 11.9.2013, which has been held by this Court to be wholly without jurisdiction, can be interfered with by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India or in exercise of its power of superintendence as embodied in Article 227 of the Constitution of India or whether such exercise of power stands barred, because of the provisions contained in Section 482 of the Code of Criminal Procedure?

15. As indicated above, resisting the writ petition, at its threshold, learned Additional Advocate General, has submitted that a petition, under Article 226 of the Constitution of India, seeking issuance of a writ in the nature of habeas corpus is not maintainable in the factual background of the present case, when an alternative remedy, in the form of Section 482 of the Code of Criminal Procedure, is available to the accused-petitioner if the accused-petitioner is of the view that his detention in custody is without jurisdiction or wholly illegal as has been contended on behalf of the accused-petitioner.

16. The Supreme Court, in *State of Maharashtra Vs. Abdul Hamid Haji Mohammed*, upon examining a question regarding justification of the High Court to exercise its jurisdiction under Article 226 for quashing the prosecution for an offence punishable under the Terrorist and Disruptive Activities (Prevention) Act, 1987 has observed thus:--

"...It is no doubt true that in an extreme case if the only accusation against the Respondent prosecuted in the Designated Court in accordance with the provisions of TADA Act is such that ex facie it cannot constitute an offence punishable under TADA Act, then the High Court may be justified in invoking the power under Article 226 of the Constitution on the ground that the detention of the accused is not under the provisions of TADA Act. We may hasten to add that this can happen only in extreme cases which would be rare and that power of the High Court is not exercisable in cases like the present where it may be debatable whether the direct accusation made in conjunction with the attendant circumstances, if proved to be true, is likely to result in conviction for an offence under TADA Act."

17. Referring to the case of *Abdul Hamid Hazi (supra)*, the Supreme Court, in the case of *Kartar Singh Vs. State of Punjab*, while dealing with the argument of alternate efficacious remedy vis-à-vis the power of High Court under Article 226, observed that though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles. The legislative history and the object of TADA Act indicate that the special Act has been enacted to meet challenges arising out of terrorism and disruption. Special provisions are enacted in the Act with regard to the grant of bail and appeals arising from any judgment, sentence or order (not being an interlocutory order) of a Designated Court, etc. The overriding effect of the provisions of the Act (i.e. Section 25 of TADA Act) and the Rules made thereunder and the non-obstante clause in Section 20(7) reading, "Notwithstanding anything contained in the Code..." clearly postulate that in granting of bail, the special provisions alone should be made applicable. If any party is aggrieved by the order, the only remedy under the Act is to approach the Supreme Court by way of an appeal. If the High Courts entertain bail applications invoking their extraordinary jurisdiction under Article 226 of the Constitution of India and pass orders, then, the very scheme and object of the Act and the

intendment of the Parliament would be completely defeated and frustrated. But at the same time, it cannot be said that the High Courts have no jurisdiction. Therefore, we totally agree with the view taken by this Court, in *State of Maharashtra (supra)*, that if the High Court is inclined to entertain any application under Article 226 of the Constitution of India, then, the power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. What those rare cases are and what would be the circumstances that would justify the entertaining of applications under Article 226 of the Constitution of India cannot be put in strait-jacket. However, we would like to emphasize and re-emphasize that the judicial discipline and comity of courts require that the High Courts should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused indicted under the special Act since this Court has jurisdiction to interfere and correct the orders of the High Courts under Article 136 of the Constitution.

18. It has to be noted that in *Kartar Singh (supra)*, the observations of the Supreme Court was in the context of the law that against an order passed by the Designated Court, under TADA Act, an appeal lies to the Supreme Court. However, even in those circumstances, where alternate efficacious remedy was, otherwise, available under the law, the Supreme Court did not shut down completely the powers of High Court under Article 226 of the Constitution of India, though it was equally emphasized that such powers should be exercised sparingly.

19. Thus, *Kartar Singh (supra)* can be said to be a ratio on the point that even the existence of alternate remedy does not prevent the High Court to exercise the powers under Article 226 in the light of established principles. The relevant observations, made in *Kartar Singh (supra)*, are reproduced below:--

"359. Though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles. The legislative history and the object of TADA Act indicate that the special Act has been enacted to meet challenges arising out of terrorism and disruption. Special provisions are enacted in the Act with regard to the grant of bail and appeals arising from any judgment, sentence or order (not being an interlocutory order) of a Designated Court etc. The overriding effect of the provisions of the Act (i.e. Section 25 of TADA Act) and the Rules made thereunder and the non-obstante clause in Section 20(7) reading, "Notwithstanding anything contained in the Code..." clearly postulate that in granting of bail, the special provisions alone should be made applicable. If any party is aggrieved by the order, the only remedy under the Act is to approach the Supreme Court by way of an appeal. If the High Courts entertain bail applications invoking their extraordinary jurisdiction under Article 226 and pass orders, then the very scheme and object of the Act and the intendment of the Parliament would be completely defeated and frustrated. But at the same time it cannot be

said that the High Courts have no jurisdiction. Therefore, we totally agree with the view taken by this Court in Abdul Hamid Haji Mohammed that if the High Court is inclined to entertain any application under Article 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. What those rare cases are and what would be the circumstances that would justify the entertaining of applications under Article 226 cannot be put in strait-jacket. However, we would like to emphasise and re-emphasise that the judicial discipline and comity of courts require that the High Courts should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused. indicted under the special Act since this Court has jurisdiction to interfere and correct the orders of the High Courts under Article 136 of the Constitution. Section 22 of Act of 1987."

(Emphasis is added)

20. In the case of Municipal Council, Khurai and Another Vs. Kamal Kumar and Another, , the question was whether the assessment list of house tax and conservancy tax confirmed by the Municipal Council, Khurai, was valid in terms of Madhya Pradesh Municipalities Act, 1961. In this case, Madhya Pradesh High Court had entertained a writ petition and one of the arguments made was that the jurisdiction, under Article 226 of the Constitution of India, should not have been exercised since an appeal against the assessment had been preferred under the Statute. The Supreme Court held that it is true that the High Court would not, ordinarily, entertain a petition under Article 226 of the Constitution, where an alternative remedy is open to the aggrieved party. Though that is so, the High Court has jurisdiction to grant relief to such a party if it thinks proper to do so in the circumstances of the case. The Supreme Court further held that the High Court has chosen to exercise discretion and it would not be right to interfere with the exercise of that discretion unless it is shown that that the action of the High Court was arbitrary or unreasonable. The relevant observations appearing, in Kamal Kumar and Another (supra), read as under:

"Before us it is contended by Mr. Setalvad on behalf of the Council that an appeal had already been preferred by the respondents against the assessment list and, therefore, they were not entitled to any relief under Article 226 of the Constitution. It is true that the High Court would not ordinarily entertain a petition under Article 226 of the Constitution where an alternative remedy is open to the aggrieved party. Though that is so the High Court has jurisdiction to grant relief to such a party if it thinks proper to do so in the circumstances of the case. In the present case the High Court has chosen to exercise discretion in favour of the respondents and it would not be right for us to interference with the exercise of that discretion unless we are satisfied that the action of the High Court was arbitrary or unreasonable. Nothing has been brought to our notice from which it could be inferred that the High Court acted arbitrarily in granting the writ prayed for to the respondents."

(Emphasis is supplied)

21. The ratio of Kamal Kumar (supra), again, can be said to be that unless the exercise of jurisdiction under Article 226 of the Constitution of India is found to be arbitrary, mere existence of alternate remedy would not prevent an exercise of jurisdiction under Article 226 of the Constitution of India.

22. In the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, , the question of jurisdiction, under Article 226 and the inherent jurisdiction under Section 482 Cr.P.C, formed one of the points for consideration. The Supreme Court made a reference to the case of S.N. Sharma Vs. Bipen Kumar Tiwari and Others, , wherein it was held that though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases, where they suspect that a cognizable offence has been committed, an aggrieved person can, in appropriate cases, always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution and if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers.

23. In the case of Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, , one of the questions, which formed the basis of determination by the Supreme Court, necessitated examination of the power of the High Court under Articles 226 and 227 of the Constitution, on the one hand and Section 482 of the Code of Criminal Procedure, on the other.

24. Referring to Bhajan Lal (supra), the Supreme Court held that it is settled that High Court can exercise its power of judicial review in criminal matters in the light of powers under Article 226 of the Constitution of India and under Section 482 of the Code of Criminal Procedure, though such powers are to be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice. It would also be proper, in this context, to examine some of the decisions, which the case of Pepsi Food (supra) has made reference to so as to understand the scope of Article 227.

25. In Waryam Singh and Another Vs. Amarnath and Another, , the Supreme Court considered the scope of Article 227 of the Constitution of India. It was held that the High Court has not only administrative superintendence over the Subordinate Courts and Tribunals, but it has also the power of judicial superintendence. The Court approved the decision of Calcutta High Court, in Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee, , where the High Court said that the power of superintendence, conferred by Article 227 of the Constitution of India, was to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting their mere errors. The Court said that it was, therefore, a case, which called for an interference by the Court of the Judicial Commissioner and it acted quite properly in doing so.

26. In Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee, , the Supreme Court

reaffirmed that the power of superintendence of High Court, under Article 227 of the Constitution of India, being extraordinary, was to be exercised most sparingly and only in appropriate cases. It said that the High Court could not, while exercising jurisdiction under Article 227 of the Constitution of India, interfere with the findings of fact recorded by the subordinate court or tribunal and that its function was limited to seeing that the subordinate court or tribunal functioned within the limits of its authority and that it could not correct mere errors of fact by examining the evidence or re-appreciating it. The Court further said that the jurisdiction under Article 227 of the Constitution of India could not be exercised, "as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issues raised in the proceedings". The Court referred, with approval, to the dictum of Morris, L.J. in *Rex v. Northumberland Compensation Appeal Tribunal*, (1952) 1 All ER 122.

27. In *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, , the Supreme Court observed as under:--

"It is thus, clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the power under Article 226 of the Constitution. Under Article 226 the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority."

28. In no uncertain words, the Supreme Court, in *Pepsi Food (supra)*, held that nomenclature whereunder a petition is filed is not quite relevant and nomenclature does not debar Court from exercising its jurisdiction, which, otherwise, the Court possesses unless there is special procedure prescribed and the procedure is mandatory.

29. This writ petition, made under Article 226 of the Constitution of India, has put to challenge the order, dated 11.9.2013, and orders passed subsequent thereto, in Special Case No. 32 of 2013, whereby the learned Special Judge, Vigilance-I, Patna, has taken cognizance of offences under Sections 384, 353, 406, 420, 467, 468, 469 and 471 read with Section 120-B of the Indian Penal Code and also under Section 10 of Bihar Conduct of Examination Act, 1981, coupled with Sections 25(1-B)(a), 26 and 30 of the Arms Act, 1959, and further under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, against the petitioner. The petitioner has sought for issuance of a writ in the nature of certiorari quashing the impugned order, dated 11.9.2013, and orders passed subsequent thereto, and in, consequence thereof, seeking issuance of a writ in the nature of habeas corpus directing release of the accused-petitioner from the custody forthwith.

30. It is seen that the principle issue raised is one of jurisdictional error. How far certiorari can be issued for correcting jurisdictional error is an issue which needs

examination.

31. Our quest for an answer to the above question bring us to the case of L. Chandra Kumar Vs. Union of India and others, . While considering L Chandra Kumar (supra), what needs to be noticed is that having taken into account the various authorities, which threw light on the question as to whether the power of judicial review forms part of the basic structure of the Constitution or not, the Court expressed, in L Chandra Kumar (supra), thus:--

"78. The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have, been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the constitution is maintained and that the legislature and the executive do not in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards, which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

79. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their

respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation is equally to be avoided.

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90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issue are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits, which will be of use to it in finally deciding the matter."

(Emphasis is added)

32. In the face of the decision, which, eventually, the Constitution Bench, in *L Chandra Kumar* (supra), has arrived at, one can no longer have any doubt that the power of judicial review under Article 226 of the Constitution of India and the power of superintendence under Article 227 of the Constitution of India form part of the basic structure of the Constitution and the Parliament, while having the power to amend the Constitution under Article 368 of the Constitution of India, cannot take away or abridge the power so conferred on the High Court under Articles 226/227 of the Constitution of India. When no constitutional amendment restricting the power of judicial review and/or superintendence under Articles 226 and/or 227 of the Constitution of India is possible, the question of a statute, limiting, restricting and/or abolishing and/or setting at naught the power of

judicial review conferred on the High Court under Article 226 of the Constitution of India and/or the power of superintendence, vested in the High Court by Article 227 of the Constitution of India, cannot arise at all, though the exercise of such powers cannot be arbitrary and must be exercised within the contours of the settled principles, which the Courts have evolved in such exercise of power must not run contrary to the scheme of the statute and unless the case require resort to such exceptional power.

33. Having held that the powers of judicial review conferred oh High Court under Article 226 of the Constitution of India and of supervision under Article 227 of the Constitution of India form part of basic structure of the Constitution, we, now, revert to the question as to whether the existence of an alternate remedy is an absolute bar to the exercise of the powers so conferred on the High Court.

34. While dealing with the above aspect of the matter, it is imperative to note that the proposition of law is well settled that where a particular statute provides a self-contained machinery for determination of questions arising under the enactment, the statutory remedies provided therein must be availed of and recourse should not be, ordinarily, allowed to be taken to writ jurisdiction. This rule was stated with great clarity by Willes, J., in *Wolverhampton New Water Works Co. v. Hawkesfor*, [(1859)6 CBNS 336]. The rule, so laid down by Willes, J., was approved by the House of Lords, in *Neville v. London Express Newspaper Ltd.* (1919 AC 368) and was reaffirmed by Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant & Co.* (1935 AC 532) and *L. Chandra Kumar Vs. Union of India and others*, .

35. While considering the above proposition, it is equally important to bear in mind that the principle treating the existence of alternate remedy as a bar to the exercise of jurisdiction under Articles 226 and/or 227 of the Constitution of India has been a rule of self-imposed restriction, a rule of policy, convenience and discretion rather than a rule of law. Though the Constitution (42nd Amendment) Act, 1976, had placed a bar on the High Court's jurisdiction to entertain certain petitions if any other remedy for redressal was provided by or under any other law, the Constitution (44th Amendment) Act, 1978, has removed this restriction. The fall out of the removal of the bar, which the Constitution (42nd Amendment) Act, 1976, had placed, as indicated hereinbefore, further strengthens the principle that there is no rule of law wholly barring exercise of jurisdiction under Articles 226 and/or 227 of the Constitution of India merely because there exists an alternate remedy; though the fact remains that to the exercise of powers under Articles 226 and 227 of the Constitution of India, existence of alternate remedy has been treated by the Courts as a self-imposed restriction, but of a limited nature.

36. In *Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes*, , the Court, while considering the scope of Article 226 of the Constitution of India in a case, wherein alternative remedy had existed, observed as under:--

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restriction.... But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain well imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy of relief, which may be obtained in a suit or other mode prescribed by the statute. Ordinarily, the Court will not entertain a petition for a writ under Article 226 where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy..... The High Court does not, therefore, act as a Court of Appeal against the decision of a Court or Tribunal to correct errors of facts and does not, by assuming jurisdiction under Article 226, trench upon an alternative remedy provided by a statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal or even itself in another jurisdiction for obtaining redress in the matter provided by a statute, the High Court, normally, will not permit by entertaining under Article 226 of the Constitution the machinery created by the statute to be bypassed and leave the party applying to it to seek resort to that machinery so set up."

(Emphasis is supplied)

37. From the observations, made in Thansingh Nathmal (supra), it becomes clear that Article 226 of the Constitution of India is couched in wide terms and though the exercise of jurisdiction thereunder is not subject to any restriction, the very amplitude of such a vast jurisdiction demands that ordinarily, this jurisdiction shall be exercised subject to certain well recognized limitations. Consequently, when an alternative remedy, in the form of appeal is provided, the Court will not, ordinarily, entertain a writ petition under Article 226 of the Constitution of India and the only exception, in this regard, is when the alternative remedy is not equally efficacious.

38. Moreover, there is no rule with regard to certiorari as there is with regard to mandamus that it will lie only where there is no other equally effective remedy. The rule, requiring exhaustion of statutory remedies before the grant of writ, had nothing to do with the jurisdiction of the Court--it was a rule of policy, convenience and discretion rather than a rule of law. Despite the existence of an alternative remedy, it is within the Jurisdiction and discretion of a High Court to grant relief under Article 226 of the Constitution of India. [See The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others, , Zila Parishad Moradabad Vs. Nundan Sugar Mills, Amroha, , Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava, , Union of India (UOI) Vs. T.R. Varma, , N.T. Veluswami Thevar Vs. G. Raja Nainar and Others, and M.G. Abrol Vs. Shantilal Chhotalal and Co., .

39. in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , the Supreme Court has held as follows:--

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India on the ground of alternative remedy, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. This plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction".

(Emphasis is added)

40. In Seth Chand Ratan Vs. Pandit Durga Prasad (D) by Lrs. and Others, , the Supreme Court has also held as follows:--

"13.....When a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is, no doubt, a rule of policy, convenience and discretion and the Court may, in exceptional cases, issue a discretionary writ of certiorari. Where there is complete lack of jurisdiction for the officer or authority or tribunal to take action or there has been a contravention of fundamental rights or there has been a violation of rules of natural justice or where the Tribunal acted under a provision of law, which is ultra vires, then, notwithstanding the existence of an alternative remedy, the High Court can exercise its jurisdiction to grant relief. When the party had statutory remedy of assailing the order passed by the District Court by filing an appeal to the High Court itself, he could not bypass the said remedy and take recourse to proceedings under Articles 226 and 227 of the Constitution. Such a course of action may enable a litigant to defeat the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of Court Fee or deposit of some amount or fulfillment of some other conditions for entertaining the appeal."

(Emphasis is supplied)

41. In K. Venkatachalam Vs. A Swamickan and Another, , election of an MLA was challenged by way of a writ petition, under Article 226 of the Constitution, on the ground that the said MLA was not an elector in the electoral roll in the constituency and, as such, lacked the basic qualification of being an MLA from the said constituency. The returned candidate opposed the writ petition on the ground of an alternative remedy of filing an election petition being available under Section 81 of the Representation of People Act, 1951, and bar contained in

Article 329(b) of the Constitution. The Supreme Court repelled the contention of the alternative remedy and held that Article 226 of the Constitution is couched in the widest possible terms and unless there is a clear bar to jurisdiction of the High Court, its powers, under Article 226 of the Constitution, can be exercised, when there is any act, which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In this case, the Supreme Court observed, "Consider the case, where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?" It was, thus, held that the High Court had rightly exercised its jurisdiction in entertaining the writ petition under Article 226 of the Constitution and declared that the appellant was not entitled to sit in Tamil Nadu Legislative Assembly with consequent restraint order on him from functioning as a Member of the Legislative Assembly.

42. The law, laid down in *K. Venkatchalam (supra)*, clearly shows that exercise of jurisdiction under Article 226 of the Constitution of India is couched in widest possible terms and, unless there is a clear bar on the jurisdiction of the High Court, it can invoke its power under Article 226 of the Constitution of India if any act is against any provisions of law or in violation of the constitutional provisions or when recourse cannot be had to the provisions of the Act for appropriate relief.

43. Jeevan Reddy, J., in his majority judgment, on behalf of a Constitution Bench of nine Judges of the Supreme Court, in the *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, , held that where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff by misinterpreting or misapplying any of the rules, regulations or notifications, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts, under Article 226 of the Constitution of India, and of the Supreme Court, under Article 32 of the Constitution of India, cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the relevant statute or statutes and would exercise their jurisdiction consistent with the provisions of the statute. The writ petition will be considered and disposed of in the light of the respective statutory provisions. This is for the reason that the power under Article 226 of the Constitution of India has to be exercised to effectuate the rule of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override the law. The power under Article 226 of the Constitution of India is conceived to serve the ends of law and not to transgress them.

44. Within the permissible limits of exercise of jurisdiction under Article 226 of the Constitution of India, as indicated by majority in *Mafatlal Industries Ltd.*

(supra), it can be safely held that having regard to the scheme of an enactment, when the High Court finds that the order is without jurisdiction, as wholly contrary to law or in denial of the principles of natural justice or the enactment, whereunder, the power is exercised, is ultra vires, High Court can invoke its extraordinary jurisdiction under Article 226 of the Constitution of India.

45. In *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another*, , a three Judges Bench of the Supreme Court observed thus:--

"8. The only point, therefore, requiring to be considered is whether the High Court should have rejected the writ petition of the respondent in limine because he had not exhausted all the statutory remedies open to him for having his grievance redressed. The contention of the learned Solicitor General was that the existence of an alternative remedy was a bar to the entertainment of a petition under Article 226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est. In all other cases, he submitted, Courts should not entertain petitions under Article 226, or in any event not grant any relief to such petitioners.

9. We see considerable force in the argument of the learned Solicitor General. We must, however, point out that the Rule that the party, who applies for the issue of a high prerogative writ should, before he approaches the Court, have exhausted other remedies open to him under the law is not one, which bars the jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a rule which Courts have laid down for the exercise of their discretion. The law on this matter has been enunciated in several decisions of this Court but it is sufficient to refer to two cases: In *Union of India v. T.R. Varma Venkararama Ayyar*, speaking for the Court said:--

"It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but, as observed by this Court in "*Rashid Ahmed v. Municipal Board, Kairana*" the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" vide also *K.S. Rashid and Son v. Income Tax Investigation Commission* and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition under Article 226, unless there are good grounds herefore."

46. There is no difference between the above and the formulation by Das, C.J., in *State of Uttar Pradesh v. Mohammad Nooh* where he observed:--

"It must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective

remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of a certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.

After referring to a few cases in which the existence of an alternative remedy had been held not to bar the issue of a prerogative writ, the learned Chief Justice added.

It has also been held that a litigant who has lost his right of appeal or has failed to perfect an appeal by no fault of his own may in a proper case obtain a review by certiorari.

In the result this Court held that the existence of other legal remedies was not per se a bar to the issue of a writ of certiorari" and that the Court was not bound to relegate the petitioner to the other legal remedies available to him.

10. The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

(Emphasis is supplied)

47. What is, thus, clear is that in *A.V. Venkateswaran* (supra), it was submitted by the learned Solicitor General that unless there was a complete lack of jurisdiction or where the order, impugned in the writ petition, had been passed in violation of the principles of natural justice, existence of alternative remedy would bar entertainment of a writ petition under Article 226 of the Constitution of India. Reacting to this submission, the Supreme Court held that notwithstanding these two fundamental limitations, which the Writ Courts have imposed on themselves, a discretion vests in the High Courts to entertain writ petition and

grant the relief even if there exists an alternative remedy and since exercise of writ jurisdiction of the High Court is a matter of discretion, it would be undesirable to lay down inflexible rules, which can be applied with rigidity in every case, which comes before the Court, for the exercise of jurisdiction may depend on a variety of individual facts, which would govern proper exercise of discretion of the Court.

48. The case of A.V. Venkateswaran (supra), therefore, is an authority for the proposition that there is no inflexible rule wholly barring the jurisdiction of the High Court under Article 226 of the Constitution of India and, in an appropriate case, under Article 227 of the Constitution of India even in respect of issue of a writ in the nature of certiorari if the facts of a given case so warrant.

49. Laying down the position of law on the subject as to when, in the face of existence of the right of appeal or revision, a High Court may interfere in exercise of certiorari jurisdiction, the Constitution Bench, in *The State of Uttar Pradesh Vs. Mohammad Nooh*, , laid down as follows:

"On the authorities referred to above, it appears to us that there may conceivably be cases--and the instant case is in point--where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play, the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, confirmed what ex facie was a nullity for reasons aforementioned. This would be so all the more if the tribunals holding the original trial and the tribunals hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy without adequate legal training and background and whose glaring lapses occasionally come to our notice. The superior court will ordinarily decline to interfere by issuing certiorari and all we say is that in a proper case of the kind mentioned above it has the power to do so and may and should exercise it. We say no more than that."

(Emphasis is added)

50. From the decision in *Mohd. Nooh* (supra), there can be no escape from the conclusion that a writ in the nature of certiorari can be issued, when a Tribunal conducts itself in a manner contrary to all accepted rules or when it adopts a procedure, which offends the superior court's sense of fair play.

51. In tune with the decision, in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , the Supreme Court has held, in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , that notwithstanding the existence of alternative remedy, High Court may, in an appropriate case, still exercise its writ jurisdiction in, at least, 3 contingencies, namely, (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of the principles of natural justice; or (iii) where the orders or the proceedings are wholly without jurisdiction or the vires of an enactment is challenged.

52. In Surya Dev Rai Vs. Ram Chander Rai and Others, , the Supreme Court, while laying down the parameters of powers under Articles 226 and/or 227 of the Constitution of India, considered a large number of authorities on the question as to when the powers under Articles 226 and/or 227 of the Constitution of India can be exercised. Dealing with this aspect of the matter, the Court observed as follows:--

"10. Article 226 of the Constitution of India preserves to the High Court the power to issue writ of certiorari amongst others. The principles on which the writ of certiorari is issued are well settled. It would suffice for our purpose to quote from the seven-Judge Bench decision of this Court in Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, . The four propositions laid down therein were summarized by the Constitution Bench in The Custodian of Evacuee Property, Bangalore Vs. Khan Saheb Abdul Shukoor, etc., as under: (AIR p. 1094, para 15).

The High Court was not justified in looking into the order of 2.12.1952, as an appellate court, though it would be justified in scrutinizing that order as if it was brought before it under Article 226 of the Constitution for issue of a writ of certiorari. The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by this Court in Hari Vishnu Kamath v. Ahmad Ishaque and the following four propositions were laid down:--

1. Certiorari will be issued for correcting errors of jurisdiction:
2. Certiorari will also be issued when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice:
3. The Court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous:
4. An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not mere wrong decision:

**** * * * * *

12. In the exercise of certiorari jurisdiction, the High Court proceeds on an assumption that a court which has jurisdiction over a subject-matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an appellate court and step into reappreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court."

(Emphasis is supplied)

53. From the decision in *Surya Dev Rai* (supra), it becomes abundantly clear that certiorari can be issued for correcting errors of jurisdiction. The errors of jurisdiction will include within its fold not merely the exercise of jurisdiction, but also when an inferior Court or Tribunal omits to exercise jurisdiction, where jurisdiction ought to have been exercised. This, in turn, will mean that when a Tribunal passes an order refusing to exercise jurisdiction by incorrectly interpreting the law, a writ, in the nature of certiorari, can be issued.

54. While considering the case of *Surya Dev Rai* (supra), it may be noted that *Surya Dev Rai* (supra) also took note of the decisions in *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, and *T.C. Basappa Vs. T. Nagappa and Another*, .

55. The fall out of the observations of the Supreme Court, in *Surya Dev Rai* (supra), particularly, with regard to what has been laid down by a seven Judge Bench, in *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, , is. that there are, at least, four circumstance, wherein a writ of certiorari may be issued by the High Court, the four circumstances being as follows:--

"1. Certiorari will be issued for correcting errors of jurisdiction:

2. Certiorari will also be issued when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction, for, when it decides without giving an opportunity to the parties to be heard or violates the principles of natural justice:

3. The Court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous:

4. An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error, which can be corrected by certiorari but not mere wrong decision."

(Emphasis is supplied)

56. From the decision, in *Surya Dev Rai* (supra), it also becomes abundantly

clear that when the error is manifest, such as, when it is based on clear ignorance or disregard of the provisions of law, it is permissible to issue a writ of certiorari or when an inferior Court or a Tribunal is found to have not proceeded in accordance with essential requirements of the law, which it was meant to administer.

57. In fact, in the State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and Others, , the Supreme Court had culled out the principles governing the exercise of powers under Article 227 of the Constitution of India. Taking into account what had been culled out as the parameters of the powers of the High Court under Article 227 of the Constitution of India in Navjot Sandhu (supra), the Supreme Court, in Surya Dev Rai (supra), observed thus:--

"The principles deducible, well settled as they are, have been well summed up the stated by a two-Judge Bench of this Court recently in State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and Others, . This Court held:--

I. The jurisdiction under Article 227 cannot be limited or fettered by any Act of the State Legislature;

i. The supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with an interlocutory order;

iii. The power must be exercised sparingly, only to keep subordinate courts and tribunals within the bound of their authority to see that they obey the law. The power is not available to be exercised to correct mere errors (whether on the facts or laws) and also cannot be exercised "as the cloak of an appeal in disguise".

(Emphasis is supplied)

58. What is, however, of immense importance to note is that the Court has clarified, in Surya Dev Rai (supra), that while exercising certiorari jurisdiction, High Court proceeds on the assumption that the Court, which has the jurisdiction over a subject matter, has jurisdiction to decide wrongly as well as rightly and that the High Court would not, therefore, assign to itself, while exercising the power of certiorari, the role of an appellate Court and step into appreciating or evaluating the evidence and/or substitute its own findings in the place of those arrived at by the inferior Court.

59. In short, while acting on the certiorari jurisdiction, though the High Court cannot convert itself into an appellate Court, it remains free to exercise the powers of issuing writ of certiorari if the conditions precedent for exercise of such a power, as discussed above, exists. As to when the High Court can interfere under Articles 226 and/or 227 of the Constitution of India is summed up, in Surya Dev Rai (supra), in the following words:--

"Such like matters frequently arise before the High Courts. We sum up our

conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:--

(1) Amendment by Act 46 of 1999 with from 1.7.2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory order; passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction--by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction--by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping subordinate courts within the bounds of their jurisdiction. When a Subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction, which it does have or the jurisdiction though available, is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of Certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceeding such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long drawn process of reasoning. Where two inferences are reasonable and the subordinate court has chosen to taken one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a Subordinate Court and the error though calling for correction is yet capable of being corrected at the

conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercise by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order of proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the sub-ordinate court as the court should have made in the facts and circumstances of the case."

(Emphasis is added)

60. What is, now, worth pointing is that the remedy of certiorari jurisdiction is available not against the decision, but against the decision-making process. In the decision-making process, if the Court or the Tribunal or, for that matter, any other authority deciding the case ignores the vital piece of evidence and thereby arrives at an erroneous conclusion or misconstrues the provisions of an enactment, there is no impediment in taking resort to Constitutional powers under Articles 226 and/or 227 of the Constitution of India.

61. The language used in Articles 32 and 226 of our Constitution is, if we may borrow the words of the decision in *T.C. Basappa Vs. T. Nagappa and Another*, , very wide and the powers of the Supreme Court as well as of the High Courts extend to issuing of orders, writs or directions including writs in the nature of "habeas corpus, mandamus, quo warranto, prohibition and certiorari" as may be considered necessary for enforcement of the fundamental rights and, in the case of the High Courts, for other purposes as well and, further, that the High Courts can make an order or issue a writ in the nature of "certiorari", in all appropriate cases and in appropriate manner, as discussed above, so long as the High Court keeps itself within the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting of such writs,

62. That Article 226 of the Constitution of India is couched in such comprehensive phraseology that it confers on the High Court the power to undo injustice, wherever it is found, is clearly emphasized in *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, . However, the exercise of this power, as we have already pointed out above, cannot be arbitrary and is governed by the self-imposed limitations evolved by the Courts themselves.

63. The authorities cited above clearly show that the power of the High Court, under Articles 226 and/or 227 of the Constitution of India, cannot be restricted by a statute. The restraint of not interfering with an order, which is adhered to by the High Courts, is really a self-imposed restriction and this restriction will not stand in the way of exercise of writ jurisdiction if the grounds for exercise of such powers exist. In other words, notwithstanding the relief provided, within the scheme of an enactment, against an order passed by a Court or Tribunal, the High Court can still exercise jurisdiction of issuing writ of certiorari under Articles 226 and/or 227 of the Constitution, when the Tribunal or the Court, subordinate to the High Court, is found to have acted without jurisdiction i.e. by assuming jurisdiction, where no such jurisdiction existed, or is found to have refused to exercise jurisdiction, where the jurisdiction existed; or acts beyond its jurisdiction or acts in flagrant disregard of law or rule governing its function or in violation of the principles of natural justice occasioning thereby failure of justice or when its order is based on clear misreading or utter disregard of the provisions of law or when it acts under a statute, which is ultra vires.

64. Though a mere erroneous decision is not amenable to writ jurisdiction under Articles 226 and/or 227 of the Constitution of India, yet when an error is apparent on the face of the proceedings, such as, when it is based on clear ignorance or utter disregard of the provisions of law or gross failure of justice has occasioned thereby, the power to issue writ of certiorari may be exercised, though this power should be resorted to sparingly and only in appropriate cases, where the judicial consciousness of the High Court dictates it to so act, lest a gross violation of justice or grave injustice should occasion.

65. We may, at this stage, pause here to point out that in *Director General, Border Security Force and Others Vs. Iboton Singh (Kh)*, , the Court, speaking through one of us (Ansari, J.), concluded thus:--

"16. We may also point out that the power of judicial review aims at ensuring that public bodies and adjudicatory authorities exercise powers within their own parameters. Not only that an erroneous exercise of power may, in a given case, be amenable to the power of judicial review, but even refusal or failure by such an authority may make the High Court interfere in exercise of its power of judicial review. The High Courts, under Article 226, are obliged to ensure that the adjudicatory authorities exercise the powers vested in them in the manner prescribed by law and that such exercise of power is within their limits; it is equally important for the High Court to ensure that the power, which belongs to an adjudicatory authority, is not left without being exercised and/or when it is

exercised, such exercise is in conformity with the power conferred on it by the legislature. The judicial review is basically one of the facets and an adjunct of "parliamentary sovereignty" so as to ensure that the Will of the legislature is acidulously observed by the concerned authority."

(Emphasis is supplied)

66. The answer, which we reach, on the basis of the discussion held above, is that the exercise of extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India and its exercise of superintendence, as contained under Article 227 of the Constitution of India, cannot be barred, has not been barred and must not be treated as barred by Section 482 of the Code of Criminal Procedure.

Distinction between Section 197 Cr.P.C. and Section 19 Prevention of Corruption Act, 1988:

67. To a query made by this Court if the conditions for grant of sanction under Section 197 of the Code of Criminal Procedure are same as the conditions prescribed by Section 19(1) of the Prevention of Corruption Act, 1988, learned Additional Advocate General candidly submits that he could not lend his hands on any reported decision delineating distinction between the scope of Section 197 of the Code of Criminal Procedure vis-?-vis Section 19 of the Prevention of Corruption Act, 1988.

68. Because of the fact that it is the contention of the State that the question of requirement of granting of sanction under Section 19 of the Prevention of Corruption Act, 1988, would arise only when it is shown, in terms of the provisions of Section 197 of the Code of Criminal Procedure, that an offence has been committed by a public servant, while acting or purporting to act in the discharge of his official duty, and therefore when it is found that the offence, committed by a public servant, is not an offence, which was committed by him, while acting or purporting to act in the discharge of his official duties, no sanction, as contemplated by Section 19(1) of the Prevention of Corruption Act, 1988, is required, let us, first, consider the rival submissions, which have been made on this aspect of law.

(A) Scope of Section 197 Cr.P.C:

69. From a bare reading of Section 197 of the Code of Criminal Procedure, it is clear that when a person, who is or was a Judge or Magistrate or a Public servant not removable from his office save by or with the sanction of the Government, is accused of any offence alleged to have been committed by him, no Court shall take cognizance of such offence except with the previous sanction of the State Government or the Central Government, as the case may be, if the offence is alleged to have been committed by him, while acting or purporting to act in the discharge of his official duty.

70. While considering the scope and ambit of Section 197 of the Code of Criminal

Procedure, it may be borne in mind that Section 197 of the Code of Criminal Procedure aims at protecting responsible public servants from being dragged to vexatious criminal proceedings for offences allegedly committed by them, while acting or purporting to act as public servants. The object, behind Section 197 of the Code of Criminal Procedure, is to afford adequate protection to public servants in order to ensure that they are not prosecuted for acts done by them in the discharge of their official duties without reasonable cause and without sanction having been obtained from the Government concerned for such prosecution. This protection has defined parameters and is limited to such acts, which have been done by a public servant in the discharge or in the purported discharge of his official duties.

71. To put what has been pointed out above a little differently, the protection, envisaged under Section 197 of the Code of Criminal Procedure, is available only when the alleged act, done by a public servant, is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If, in doing his official duty, a public servant acts in excess of his duty, yet when there is a reasonable connection or nexus between the act done and the performance of the official duty, the excess will not deprive the public servant of the protection available to him under Section 197 of the Code of Criminal Procedure. [See *Bakhshish Singh Brar Vs. Gurmej Kaur and Another*, . See also *State of H.P. Vs. M.P. Gupta*, .

72. While considering the scope of Section 197 of the Code of Criminal Procedure, it is apposite to recall the law laid down in *State of H.P. Vs. M.P. Gupta*, , wherein the Privy Council held, "A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. "This view has been approved by Privy Council in *State of H.P. Vs. M.P. Gupta*, .

73. The acts, which Section 197 of the Code of Criminal Procedure, seek to protect, are those, which fall within the scope and range of the official duties of the public servant concerned. Thus, the protective umbrella of Section 197 of the Code of Criminal Procedure extends to only such acts, which fall within the scope and range of a public servant's official duty.

74. In other words, for availing protection under Section 197 of the Code of Criminal Procedure, the act of the public servant concerned must not only fall within the scope and range of his official duty, but that the offence must be connected with the official duty and not unconnected therewith. The necessary corollary flowing from this limitation is that when an act is prohibited to be done by a public servant in the discharge of official duty, such act of the public servant, though committed during the discharge of the official duty, will not be protected under Section 197 of the Code of Criminal Procedure.

75. From what has been observed above, it is clear that the primary test for determining if an act, which constitutes-offence, is an act, which can be claimed

to have been done in the discharge or purported discharge of the duty, is that when questioned, the public servant must be able to say that whatever had been done by him was in the discharge or purported discharge of his duties.

76. There is subtle, but definite distinction between the expression during the discharge of official duties and in discharge of official duty. An Officer may be on duty; but what he might have done may be an offence, which will fall outside his duty. For instance, when a Police Officer, on duty, commits offence of rape, he cannot say that since he was on duty, the act done by him is protected by Section 197 of the Code of Criminal Procedure. The test, therefore, is that the act, which an accused has allegedly done, must be shown to form part of his duty, though he may have exceeded his powers, while discharging his duties.

77. What is, now, of utmost importance to note is that unless an act, allegedly committed by a public servant of the categories mentioned in Section 197 of the Code of Criminal Procedure, amounts to an offence, the question of taking resort to Section 197 of the Code of Criminal Procedure, does not arise at all. In other words, an act, which becomes a subject-matter of prosecution and sanction in terms of Section 197 of the Code of Criminal Procedure, must amount to an offence, for, unless an act, complained of, amounts to an offence, the question of taking resort to Section 197 of the Code of Criminal Procedure would not arise at all.

78. At the first blush, therefore, the requirement of sanction under Section 197 of the Code of Criminal Procedure is paradoxical. On the one hand, Section 197 of the Code of Criminal Procedure protects a public servant from being prosecuted without sanction if the acts, which constitutes the offence, has been done by him, while acting or purportedly acting in the discharge of his official duties, it (Section 197 of the Code of Criminal Procedure) allows, at the same time, prosecution of such a public servant without sanction if his act, which constitutes the offence, was done by him, while not acting in the discharge or purported discharge of his duties.

79. Though, in either case, an offence is committed by a public servant, he is, in one case, protected; whereas, in the other case, he is not. It is in this context that the meaning of the expression while acting or purporting to act in discharge of his official duty needs to be carefully analysed and understood, for, it can never be a part of the duty of a public servant to commit an offence.

80. Thus, if construed too narrowly, Section 197 of the Code of Criminal Procedure can never be applied, for, it is no part of the duty of a public servant to commit an offence. At the same time, if the expression, "while acting or purporting to act in the discharge of his official duty", is construed too liberally, it may vest in a public servant absolute power and make him berserk.

81. There is yet another significant aspect of Section 197 of the Code of Criminal Procedure, which, unless carefully taken note of may lead to aberrations in the course of administration of justice. When an act is done, though offence,

honestly in the discharge of public duty, it is protected under Section 197 of the Code of Criminal Procedure. However, when such a public servant dishonestly acts in the discharge of his public duty and thereby commits an offence, can he be still covered by Section 197 of the Code of Criminal Procedure?

82. The answer to the question, posed above, has to be in the affirmative, for, such a dishonest act will be covered by the expression purporting to act in the discharge of his official duty. Thus, not only the honest discharge of a public servant's duty, which may amount to an offence, would be protected under Section -197 of the Code of Criminal Procedure, but also his dishonest act, which, too,-may amount to an offence, would be protected if the act can be construed to be in the purported discharge of his duties. It is therefore, necessary that the act of the public servant is examined in order to test if the act amounts to an offence and if so, whether such an act has been done, while acting or purporting to act in the discharge of his official duties.

83. A classic case, covering the above paradoxical facet of Section 197 of the Code of Criminal Procedure, is a case, wherein a public servant is alleged to have committed an offence under Section 409 of the Indian Penal Code. Will such an offence require sanction for prosecution of the public servant concerned ? The answer to this complex question is not far to seek.

84. While, however, ascertaining the answer to the question, so posed, what one has to bear in mind is that in order to constitute an offence under Section 409 of the Indian Penal Code, there has to be, first, entrustment or dominion over the property and, secondly, such entrustment or dominion must be in the capacity of public servant; thirdly, there must have been disposal of the property, entrusted to the public servant concerned or under the dominion of public servant concerned, and, fourthly, the disposal of such a property must have been dishonest.

85. Thus, it is clear that the entrustment or dominion over the property would be in official capacity. Similarly, disposal of the property could not have but been done in the official capacity of the public servant concerned. If the disposal of the property was innocent, it was an official act done in discharge of official duty; if the disposal of the property was dishonest, it was the dishonest doing of an official act; but nevertheless the act, in question, was in either case official, because the public servant would not have disposed of the property except while acting or purporting to act in the discharge of his official duty.

86. Putting more explicitly, if the act was done innocently, it would be an act done in the discharge of his official duty and if the disposal of the property was with dishonest intention or motive, the act would be an act purportedly done in the discharge of his official duty. Not only in the first instance, but even in the second instance (i.e., in the case of dishonest disposal of property), the fact remains that the doing of the act by the public servant was still official, though it was purportedly done in discharge of official duty. In the second instance, too,

therefore, when the public servant is required to be prosecuted for the offence, under Section 409 of the Indian Penal Code, on the ground that he has dishonestly disposed of the property, his prosecution would necessitate obtaining of sanction, under Section 197 of the Code of Criminal Procedure, before cognizance in respect of the offence is taken.

87. To appreciate what has been indicated above, reference may be made to *Shreekantiah Ramayya Munipalli Vs. The State of Bombay*, wherein the Supreme Court explained the scope of Section 197 thus:--

"Now it is obvious that if Section 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied, for, of course, it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning. What it says is--"when any public servant is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.

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

Now an offence seldom consists of a single act. It is usually composed of several elements and, as a rule, a whole series of acts must be proved before it can be established. In the present case, the elements alleged against the second accused are, first, that there was an "entrustment" and/or "dominion", second, that the entrustment and/or dominion was "in his capacity as a public servant", third, that there was a "disposal"; and fourth, that the disposal was "dishonest". Now it is evident that the entrustment and/or dominion here were in an official capacity, and it is equally evident that there could in this case be no disposal, lawful or otherwise, save by an act done or purporting to be done in an official capacity. Therefore, the act complained of, namely the disposal, could not have been done in any other way. If it was innocent, it was an official act; if dishonest, it was the dishonest doing of an official act, but in either event the act was official because the second accused could not dispose of the goods save by the doing of an official act, namely officially permitting their disposal; and that he did. He actually permitted their release and purported to do it in an official capacity, and apart from the fact that he did not pretend to act privately, there was no other way in which he could have done it. Therefore, whatever the intention or motive behind the act may have been, the physical part of it remained unaltered, so if it was official in the one case it was equally official in the other, and the only difference would lie in the intention with which it was done: in the one event, it would be done in the discharge of an official duty and in the other, in the purported discharge of it."

(Emphasis is added)

88. In *Amrik Singh Vs. The State of Pepsu*, too, the Supreme Court summed up the scope of Section 197 in the following words:--

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

(Emphasis is supplied)

89. Analyzing the facts of the case, as emerged in Amrik Singh (supra) and also quoting with approval the observations made in Shreekantiah Ramayya Munipalli (supra), their Lordships held as follows:--

"In our judgment, even when the charge is one of misappropriation by a public servant, whether action is required under Section 197(1) will depend upon the facts of each case. If the acts complained of are so integrally connected with the duties attaching to the office as the office as to be inseparable from them, then sanction under Section 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required."

(Emphasis is added)

90. A Constitution Bench of the Supreme Court had, in Matajog Dobey Vs. H.C. Bhari, , the occasion to consider the scope of Section 197 of the Code of Criminal Procedure. Laying down the test to be adopted to ascertain if Section 197 of the Code of Criminal Procedure was attracted or not, the Constituent Bench, in Matajog Dobey (supra), held as follows:--

"Slightly differing tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in Section 197 of the Code; "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". But the difference is only in language and not in substance. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merit. What we must find out is whether the act and the official duty are so inter-

related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation.... The result of the foregoing discussion is this : There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

(Emphasis is supplied)

91. We may also, at this stage, refer to Pukhraj Vs. State of Rajasthan and Another, , wherein the Supreme Court held as under:--

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

(Emphasis is supplied)

(B) How Section 19 Prevention of Corruption Act, 1988, differs from Section 197 Cr.P.C:

92. As against the fact that the requirement of sanction under Section 197 of the Code of Criminal Procedure comes into play, when an offence is alleged to have been committed by a public servant, while acting or purporting to act in the discharge of his official duties, the question of requirement of sanction under

Section 19 of the Prevention of Corruption Act, 1988, arises if an offence is committed by a public servant, which is punishable under Sections 7, 10, 13 and 15 of the Prevention of Corruption Act, 1988, and the conditions precedent, as regards requirement of sanction, envisaged by Section 197 of the Code of Criminal Procedure, do not come into play in respect of those offences under the Prevention of Corruption Act, 1988, which requires sanction.

93. While considering the scope of Section 197 of the Code of Criminal Procedure vis-à-vis Section 19 of the Prevention of Corruption Act, 1988, it needs to be borne in mind that Section 197 of the Code of Criminal Procedure concerns a public servant, who is accused of any offence alleged to have been committed by him, while acting or purporting to act in the discharge of his official duty; whereas offence, created and punishable under the Prevention of Corruption Act, 1988, are those, which can never be treated as acts having been done either directly or even purportedly in the discharge of a public servant's official duties. The Parliament, therefore, intended to continue to maintain the distinction between the scope of Section 197 of the Code of Criminal Procedure and Section 19 of the Prevention of Corruption Act, 1988.

94. Section 197 of the Code of Criminal Procedure and Section 19 of the Prevention of Corruption Act, 1988, operate in two distinctly different fields. In the cases covered by the Prevention of Corruption Act, 1988, granting of sanction is, more or less, automatic in nature and that is why, (we would point out a little later) "absence" or "omission" of sanction does not, in the light of Section 19(3) of the Prevention of Corruption Act, 1988, make per se the conviction of an accused wholly without jurisdiction unless failure of justice is occasioned or resulted; whereas the nature of act done is of great significance from the perspective of Section 197 of the Code of Criminal Procedure if the act can be described to have been done by the accused, while acting or purporting to act in the discharge of his official duty.

95. The above proposition of law may be clearly gathered from the observations made in *Kalicharan Mahapatra Vs. State of Orissa*, wherein the Supreme Court, at paragraph 9, observes as under:--

"13. It must be remembered that in spite of bringing such a significant change to Section 197 of the Code in 1973, Parliament was circumspect enough not to change the wording in Section 19 of the Act which deals with sanction. The reason is obvious. The sanction contemplated in Section 197 of the Code concerns a public servant who is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty", whereas the offences contemplated in the PC Act are those which cannot be treated as acts either directly or even purportedly done in the discharge of his official duties. Parliament must have desired to maintain the distinction and hence the wording in the corresponding provision in the former PC Act was materially imported in the new PC Act, 1988 without any change in spite of the change made in Section 197 of the Code."

(Emphasis is supplied)

96. Referring to the above -observations made in Kalicharan Mahapatra (supra), the Supreme Court, in *Lalu Prasad @ Lalu Prasad Yadav Vs. State of Bihar* through CBI (AHD), Patna, , further observed," with regard to the concept of Section 197 of the Code of Criminal Procedure vis-?-vis Section 19 of the Prevention of Corruption Act, 1988, in the following words:--

"It may be noted that Section 197 of the Code and Section 19 of the Act operate in conceptually different fields. In cases covered under the Act in respect of public servants, the sanction is of automatic nature and the factual aspects are of little or no consequence. Conversely, in a case rentable to Section 197 of the Code, the substratum and basic features of the case have to be considered to find out whether the alleged act has any nexus with the discharge of duties. Position is not so in case of Section 19 of the Act."

(Emphasis added)

97. What emerges from the above discussion is that Section 197 of the Code of Criminal Procedure concerns a public servant, who is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty; whereas offence, created and punishable under the Prevention of Corruption Act, 1988, are those, which can never be treated as acts having been done either directly or even purportedly in the discharge of a public servant's official duties.

Scope of Section 167(2) vis-?-vis Section 309(2) of the Code of Criminal Procedure;

98. Whether an accused can be, necessarily, remanded to judicial custody under Section 309(2) of the Code of Criminal Procedure after charge-sheet has been submitted or can an accused be remanded to custody, under Section 167(2) of the Code of Criminal Procedure even after filing of charge-sheet and without taking cognizance of any offence.

99. If cognizance is not taken of any offence on submission of charge-sheet, would it denude the Court of its powers, under Section 167(2) of the Code of Criminal Procedure, to remand an accused to custody, against whom charge-sheet is submitted, more particularly, in a case, where charge-sheet has been submitted, before the statutory period for submission of charge-sheet, as envisaged by sub-clauses (i) and (ii) of clause (a) of sub-section (2) of Section 167 of the Code of Criminal Procedure, expires or elapses.

100. The contention of Mr. Alam, learned Counsel, that once a charge-sheet is submitted on completion of investigation, Court cannot, without taking cognizance, remand an accused to judicial custody, needs to be, now, examined, particularly, because further contention of Mr. Alam is that on submission of charge-sheet, a Court can remand an accused under Section 309(2) of the Code of Criminal Procedure only inasmuch as Section 309(2) mandates, according to

Mr. Alam, that it is only after taking cognizance of the offences triable by a Court that the Court acquires the power to remand an accused to custody.

101. In other words, what Mr. Alam, learned Counsel, contends is that on submission of charge-sheet, a Court stands denuded of its power to remand an accused to custody by virtue of its power under Section 167(2) of the Code of Criminal Procedure and the only provision of law, which empowers a Court to remand to judicial custody an accused, upon submission of charge-sheet, is Section 309(2) of the Code of Criminal Procedure provided that the Court has, on the basis of charge-sheet, taken cognizance of offence or offences under Section 190(1)(b) of the Code of Criminal Procedure.

102. In order to test the above contention of Mr. Alam, let us assume, for a moment, that an accused has been remanded, on 1st January, 2014, to judicial custody with direction to detain him until 14th January, 2014; but the charge-sheet against the accused is submitted on 12th January, 2014. No sooner the charge-sheet is filed, the custodial detention of the accused cannot be said to have become illegal unless the Magistrate, on 12th January, 2014, itself, takes cognizance of the offence or offences disclosed by the charge-sheet to have been committed and extends further remand of the accused.

103. Yet another example can be that the charge-sheet is submitted on 14th January, 2014, and because of voluminous charge-sheet, the Court may require time to decide if it shall or shall not take cognizance of the offence alleged to have been committed by the accused. Yet, if Mr. Alam's contention is correct, the Court would per force be made to either take cognizance of some offence or release the accused, because it has not taken cognizance of any offence, though the Court could not apply its mind completely to the facts uncovered by investigation, because of paucity of time.

104. The net result of what Mr. Alam contends would be that the Court would be required to either take cognizance or release the accused without having been able to make up its mind if the materials, collected during investigation, do make out a case calling, or not calling, for taking of cognizance. This proposition would frustrate the scheme of the Code of Criminal Procedure, which aims at maintaining continuity in matters of remand, be the remand during the stage of investigation or on submission of charge-sheet.

105. Necessarily, therefore, the submission of the charge-sheet will not take away the power of the Court to remand an accused under Section 167(2) of the Code of Criminal Procedure. Far from this, the Court, notwithstanding filing of the charge-sheet, would still be competent to remand the accused by taking recourse to Section 167(2) of the Code of Criminal Procedure until the time it decides on the question of taking of cognizance and if it does take cognizance, then, further remand of the accused, if ordered, would be under Section 309(2) of the Code of Criminal Procedure so that continuity be maintained. If, however, the Court finds that no case for taking of cognizance has been made out, it may, having given

notice to the informant and the victim, if any, close the proceedings.

106. It needs to be kept in view that the scope of Section 167(2) is widely different from the scope of Section 309(2) of the Code of Criminal Procedure. Section 167(2) of the Code of Criminal Procedure is available to a Court to remand an accused until the time the Court either takes cognizance or declines to take cognizance of any offence and it is only when the Court takes cognizance that further remand, if made, has to be pursuant to the Court's power under Section 309(2) of the Code of Criminal Procedure.

107. The case of Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and Another, , is a clear pointer to the conclusion we have reached above inasmuch as facts of the case of Suresh Kumar Bhikamchand Jain (supra) were, to some extent and in certain aspects, same as in the present case, because in the case of Suresh Kumar Bhikamchand Jain (supra), despite the fact that a charge-sheet had been submitted, the Magistrate did not take cognizance and yet remanded the accused to custody. The argument, advanced, on behalf of the petitioner, Suresh Kumar Bhikamchand Jain (supra), was that upon submission of charge-sheet, the Magistrate could not have remanded the accused to custody without taking cognizance and because sanction was being awaited by the Magistrate, the accused was entitled, as of right, to be released on bail.

108. The question, therefore, arose if the remand of the accused, on submission of charge-sheet without taking cognizance, is sustainable in law. This factual background becomes evident from the observations made, at paragraph 16, in Suresh Kumar Bhikamchand Jain (supra), which read as follows:--

".....it would be evident that both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the petitioner's arrest and remand to police custody. It is true that cognizance was not taken by Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but does such failure amount to non-compliance with the provisions of Section 167(2) CrPC is the question with which we are confronted."

(Emphasis is added)

109. In other words, the Magistrate's power to remand an accused under Section 167(2) of the Code of Criminal Procedure without taking cognizance was the question in controversy in Suresh Kumar Bhikamchand Jain (supra). This position becomes transparent on reading the observations made, at paragraph 2 also, in Suresh Kumar Bhikamchand Jain (supra), which run as follows:--

"One of such issues concerns the power of the Magistrate to pass orders of remand even beyond the period envisaged under Section 167(2) of the Code of Criminal Procedure. In the instant case, despite charge-sheet having been filed, no cognizance has been taken on the basis thereof. The learned Magistrate has, however, continued to pass remand orders, without apparently having proceeded

to the stage contemplated under Section 309 of the Code of Criminal Procedure."

(Emphasis is added)

110. Considering the fact that charge-sheet had been filed, in Suresh Kumar Bhikamchand Jain (supra), within the time stipulated by Section 167(2) of the Code of Criminal Procedure, but sanction to prosecute the accused having not been obtained, no cognizance had been taken, the question, which, therefore, arose, if we may repeat, was whether the Magistrate, without taking cognizance, could have remanded the accused or, rather, continued to have remanded the accused by taking recourse to Section 167(2) of the Code of Criminal Procedure. That this was the legal issue is apparent from the observations made, at paragraph 4, in Suresh Kumar Bhikamchand Jain (supra), which read as follows:--

"What has been stressed upon on behalf of the petitioner is that, although, chargesheet had been filed within the time stipulated under Section 167(2) of the Code of Criminal Procedure, sanction to prosecute the petitioner had not been obtained, as a result whereof, no cognizance was taken of the offence. Notwithstanding the above, remand orders continued to be made and the petitioner remained in magisterial custody."

(Emphasis is supplied)

111. It was contended, on behalf of the petitioner, in Suresh Kumar Bhikamchand Jain (supra), that since the statutory period of 90 days, envisaged by Section 167(2) of the Code of Criminal Procedure, had lapsed, though the charge-sheet had been submitted before the statutory period of 90 days had elapsed, the petitioner could not have been remanded to custody by the Magistrate, who is yet to take cognizance, but cannot take cognizance for want of sanction.

112. The further submission, made on behalf of the petitioner, in Suresh Kumar Bhikamchand Jain (supra), was that as far as Section 309(2) of the Code of Criminal Procedure is concerned, the same would be applicable only after cognizance stood taken and since, cognizance had not been taken, trial could not have been said to have commenced and the petitioner was, therefore, entitled to be released on bail, forthwith, on the basis of the indefeasible right acquired by the petitioner on the failure of the investigating authority to obtain sanction. That these were the submissions made, on behalf of the petitioner, in Suresh Kumar Bhikamchand Jain (supra), are clear from a reading of paragraph 7, which we reproduce below:--

"Mr. Lalit also submitted that Section 309 CrPC, which also deals with remand of the accused under certain circumstances, does not apply to the allegations relating to the provisions of the PC Act, inasmuch as, there is no committal proceeding contemplated in the proceeding before the learned Special Judge. However, as far as Section 309 CrPC is concerned, Mr. Lalit submitted that the same would be applicable only after cognizance of the offence had been taken or

upon the commencement of the trial before the Special Court. In the absence of cognizance being taken by the Special Court, it could not be said that the trial had commenced and, therefore, further detention of the petitioner was wholly illegal and not authorized in law and he was, therefore, entitled to be released on bail forthwith on the basis of the "indefeasible right" acquired by him on the failure of the investigating authorities to obtain sanction for prosecuting the petitioner."

(Emphasis is supplied)

113. The question, therefore, which fell for consideration, in Suresh Kumar Bhikamchand Jain (supra), was, in the words of Supreme Court, at paragraph 13, thus, "the right of a Magistrate or the trial court to pass orders of remand in terms of Section 167(2) of the Code of Criminal Procedure beyond the period prescribed therein.

114. Having taken note of the provisions embodied in Section 167 of the Code of Criminal Procedure, as a whole, vis-?-vis Section 309(2) of the Code of Criminal Procedure, the Supreme Court delineated the distinction between Section 167(2), on the one hand, and Section 309(2) of the Code of Criminal Procedure, on the other, in Suresh Kumar Bhikamchand Jain (supra), in the following words:--

"In our view, grant of sanction is nowhere contemplated under Section 167 of the Code of Criminal Procedure. What the said section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as the ones referred to hereinbefore. Both the decisions in Natbar Parida case and in Sanjay Dutt case were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) CrPC and an application having been made for grant of bail prior to the filing of the charge-sheet, this court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether the cognizance is taken is not material as far as Section 167 of the Code of Criminal Procedure is concerned. The right which may have accrued to the petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 CrPC, it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 CrPC. The scheme in CrPC is such that once the investigation stage is completed, the court proceeds to the next stage, which is taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) CrPC, the Magistrate is vested with authority to remand the accused to custody, both police custody and/or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 CrPC. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court."

(Emphasis is supplied)

115. Finally, the Supreme Court, in Suresh Kumar Bhikamchand Jain (supra), observed and held as under:--

"Having regard to the above, we have no hesitation in holding that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, the accused was not entitled to grant of statutory bail since the charge-sheet had been filed well within the period contemplated under Section 167(2)(a)(ii) CrPC. Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings. In that view of the matter, the special leave petition deserves to be and is hereby dismissed."

(Emphasis is added)

116. From what have been observed and laid down in Suresh Kumar Bhikamchand Jain (supra), it becomes more than abundantly clear that on submission of charge-sheet, and while awaiting grant of sanction under the

Prevention of Corruption Act, 1988, the Magistrate is empowered to remand an accused to custody by virtue of powers vested in him under Section 167(2) of the Code of Criminal Procedure and it is only when he takes cognizance, the stage of Section 309(2) of the Code of Criminal Procedure is reached and till then, the remand of the accused can be legally continued by taking resort to the "provisions embodied in Section 167(2) of the Code of Criminal Procedure.

117. Thus, while awaiting the grant of sanction, on submission of charge-sheet, Court is not denuded of its power to remand an accused to custody by virtue of his power under Section 167(2) of the Code of Criminal Procedure. However, once cognizance is taken, the remand, if any, would be pursuant to Court's power, under Section 309(2) of the Code of Criminal Procedure.

When cognizance is taken and what are the modes of taking cognizance:

118. While considering the above aspects of law, it is necessary to bear in mind that cognizance has not been defined under the Code. The word cognizance really indicates the stage, when a Magistrate or a Judge, first, takes judicial notice of offence(s).

119. In view of the fact that it is Section 190 of the Code of Criminal Procedure, which deals with taking of cognizance of offences by a Magistrate, it is appropriate that the provisions of this Section are taken note of. Section 190 of the Code of Criminal Procedure runs as follows:--

"190. Cognizance of offences by Magistrates.--(1) Subject to the provisions of this Chapter, any Magistrate of the First Class, and any Magistrate of the Second Class especially empowered in this behalf under sub-section (2) may take cognizance of any offence--

(a) Upon receipt of a complaint of facts, which constitute such offence,

(b) Upon a police report of such facts;

(c) Upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed."

120. A patient reading of sub-section (1) of Section 190 clearly shows that a Magistrate can take cognizance of an offence in three" distinct circumstances, namely, (a) upon receipt of a complain! of facts, which constitute such offence, (b) upon a police report of such facts, and (c) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. Thus, Clauses (a), (b) and (c) of sub-section (1) of Section 190 of the Code of Criminal Procedure set out three distinct modes for taking of cognizance by Magistrates.

121. Let me, first, deal with the question as to when and how a Magistrate can take, or be said to have taken, cognizance on the basis of a police report. While considering this aspect of the matter, it needs to be pointed out that Chapter-XII of the Code of Criminal Procedure, 1973, deals with information to the police and

their powers to investigate. Sub-section (1) of Section 154 of the Code of Criminal Procedure provides that every information, relating to the commission of a cognizable offence, if given orally to an Officer-in-Charge of a police station, shall be reduced, in writing, by him or under his direction and be read over to the informant and every such information, whether given in writing or reduced to writing, shall be signed by the person giving it. Subsection (1) of Section 156 of the Code of Criminal Procedure vests, in the Officer-in-Charge of a police station, the power to investigate any cognizable case without the order of a Magistrate and sub-section (3) of that Section authorizes the Magistrate, empowered under Section 190 of the Code of Criminal Procedure, to order an investigation as mentioned in sub-section (i) of Section 156 of the Code of Criminal Procedure.

122. What is, now, pertinent to note is that while Section 156(1) permits a police officer to investigate a cognizable case, Section 155(2) of the Code of Criminal Procedure bars the police from investigating a non-cognizable case without the order of a Magistrate, who has the power to try the case or commit the case for trial. When, however, a police officer receives, in terms of Section 156(3) of the Code of Criminal Procedure, from a Magistrate, an order to investigate a non-cognizable case, he will have, according to Section 155(3) of the Code of Criminal Procedure, same powers of investigation as he has in a cognizable case. What shall an Officer-in-Charge of a police station do on completion of investigation is set out in Section 173.

123. Sub-section (2)(i) of Section 173 of the Code of Criminal Procedure provides that as soon as investigation is completed, the Officer-in-Charge of the police station concerned shall forward to the Magistrate, empowered to take cognizance of the offence on a police report, a report, in the form prescribed by the State Government, setting out various particulars including whether, in the opinion of the officer, any offence appears to have been committed and if so by whom. The report, so submitted, stands defined, under Section 21* of the Code of Criminal Procedure, as the police report. Thus, the police report, which Section 190(1)(b) of the Code of Criminal Procedure speaks of, is, as defined in Section 21* of the Code, the report, which is forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code of Criminal Procedure.

124. When such a police report is received by a Magistrate, what option(s) a Magistrate has stands succinctly described in *Bhagwant Singh Vs. Commissioner of Police and Another*, wherein a three Judge Bench, speaking through Bhagwati, J, (as His Lordship then was), observed thus, "Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate under Sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things:--(1) he may accept the report and take cognizance of the offence and issue process, or (2) he may disagree with the report and drop the proceeding, or (3) he may direct further

investigation under Sub-section (3) of Section 156 and require the police to make a further report. The report may, on the other hand, state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate, again, has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding, or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process, or (3) he may direct further investigation to be made by the police under Sub-section (3) of Section 156."

125. In sum, when a Magistrate considers a police report submitted to him under Section 173(2) of the Code of Criminal Procedure, he has three options, namely, (i) that he may, upon finding that the investigation does not disclose commission of any offence(s), drop the proceeding, or (ii) he may direct further investigation, or (iii) he may take cognizance of offence(s) as may be disclosed by the police report and issue process(es) to the person(s) accused of having committed the offence(s).

126. What emerges from the above discussion is that when a Magistrate considers the question as to whether a police report discloses commission of offence(s), which he is competent to try or competent to commit for trial, and, upon such consideration, when he forms the opinion that the investigation discloses commission of offence(s) and decides to issue process, the Magistrate shall be said to have taken cognizance inasmuch as he could not have directed issuance of process without taking cognizance. Though, ideally, an order, taking cognizance, must be a speaking order; yet even when an order, whereby process is issued, is not a speaking order, it will nevertheless be regarded as an order having been passed on taking cognizance, for, as already indicated hereinbefore, no process can be directed to be issued by a Magistrate on the basis of a police report without taking cognizance.

127. Let me, now, turn to the question as to when and how a Magistrate can take cognizance or can be said to have taken cognizance of offence under Clause (a) of sub-section (1) of Section 190, i.e., upon receipt of a complaint of facts, which constitute such offence. This aspect of law necessarily involves analysis of the provisions of Sections 200, 202, 203 and 204. Section 200 of the Code, if we may point out, reads as follows:--

"200. Examination of complainant.--A Magistrate, taking cognizance of an offence on a complaint, shall examine, upon oath, the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses--(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the

complaint, or (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192. Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

128. Whether a Magistrate has or has not taken, on the basis of a complaint, cognizance of an offence may, in a given case, be reflected by the mode in which the case is sought to be instituted and the nature of the preliminary action, if any, taken by the Magistrate. The Supreme Court, in *R.R. Chari Vs. The State of Uttar Pradesh*, , quoted with approval the observations made by Kulada Charan Das Gupta, J., in *Superintendent and Remembrancer of Legal Affairs Vs. Abani Kumar Banerjee*, , with regard to the question as to when a Magistrate can be said to have taken "cognizance" on the basis of a "complaint". The relevant observations read as follow:--

"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 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 is supplied)

129. From what has been observed above, it clearly transpires that when, on receiving a complaint, the Magistrate applies his mind for the purpose of proceeding under Section 200 of the Code of Criminal Procedure, and the succeeding Sections in Chapter-XV of the Code of Criminal Procedure, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a) of the Code of Criminal Procedure. If, instead of proceeding under Chapter-XV, the Magistrate has, in the judicial exercise of his discretion, taken action of some other kind, such as, issuing a search warrant or ordering investigation by the police under Section 156(3) of the Code of Criminal Procedure, he cannot be said to have taken cognizance of any offence. (See also *Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others*, .

130. What surfaces from the above discussion is that the process of taking of cognizance under Clause (a) of Section 190 of the Code of Criminal Procedure, (i.e., upon receipt of a complaint of facts, which constitute such offence) is distinct and different from the manner in which cognizance is taken under Clause

(b) of sub-section (1) of Section 190 of the Code of Criminal Procedure, i.e., upon a police report of such facts.

131. Taking of cognizance, in the case of a complaint, implies application of mind by a Magistrate to the contents of a complaint in order to decide as to whether the complaint discloses commission of offence(s) and whether he shall proceed to examine the complainant and his witnesses, if any, present and, upon such consideration, when he examines the complainant, he can be safely held to have taken cognizance, for, he could not have examined the complainant, under Section 200, without taking cognizance.

132. On the other hand, taking of cognizance, on the basis of a police report submitted under Section 173(2) of the Code of Criminal Procedure, implies application of mind by a Magistrate to the contents of such a police report to determine if there are materials reflecting commission of offence(s), which he is competent to try or commit for trial, and, upon such consideration, when he decides to issue process, he can be safely held to have taken cognizance, for, he could not have issued process without taking cognizance. It is for this reason that, in *Tula Ram and Others Vs. Kishore Singh*, , the Supreme Court has held that when a Magistrate initially applies his mind to the contents of a complaint, becomes conscious and aware of the allegations made therein and decide to examine the validity of the said complaint by examining the complainant, he can be said to have taken cognizance.

133. In short, in the light of the decision in *Abani Kumar Banerji* (supra), approved in *R.R. Chari* (supra), and in view of what *Devarapalli Lakshminarayana Reddy* (supra) lays down, it is abundantly clear that when a Magistrate applies his mind to the contents of a complaint for the purpose of proceeding in accordance with the subsequent provisions of the Code, particularly, Section 200 thereof, he can be taken to have taken cognizance. When, however, the Magistrate applies his mind not for the purpose of proceeding under Chapter-XV of the Code, but for taking action of some other kind, such as, ordering investigation under Section 156(3) of the Code of Criminal Procedure or directing issuance of search warrant, he cannot be said to have taken cognizance of the offence.

134. Thus, whether the Magistrate has or has not taken "cognizance" of an offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted and the nature of the preliminary action, if any, taken by the Magistrate.

135. What surfaces from the discussions held above is that the scheme of the Code is that when a complaint is presented before a Magistrate, he can either direct an investigation, in terms of sub-section (3) of Section 156 of the Code, or he may decide to proceed with the complaint. If he decides to proceed with the complaint by taking cognizance of the offence(s), which the complaint discloses, he shall, for this purpose, take steps in terms of Section 200 of the Code by

examining the complainant. If the Magistrate, on receipt of the complaint, takes no steps to indicate that the Magistrate wanted to proceed in terms of Section 200 of the Code and sends the complaint to police for investigation, it will be indicative of the fact that the Magistrate has not taken cognizance.

136. Thus, in the later case, there will be no impediment, on the part of the Magistrate, to take cognizance of the offence if and when the police, on investigation carried out, submit a report, in this regard, in terms of Section 190(b). The act of sending of the complaint to police for investigation under Section 156(3) of the Code of Criminal Procedure, is really at a pre-cognizance stage.

137. What is, now, necessary to note is that an "investigation", which is directed, under Section 202(1) of the Code of Criminal Procedure, is really aimed at helping a Magistrate, determine if process needs to be issued or not. The investigation, which Section 202(1) of the Code of Criminal Procedure conceives, is, therefore, materially different from the investigation, which is ordered under Section 156(3) of the Code of Criminal Procedure.

138. Thus, it is clear that when an order is passed under Section 156(3) of the Code of Criminal Procedure, a police officer has all the powers of investigation, which he, otherwise, has in a cognizable case and the report, which he submits on completion of such an investigation, is a police report within the meaning of the provisions of Section 173(2)(i) read with Section 21; but when an Investigation is directed under Section 202(1), the report of the investigation, which the police officer may submit, is merely to enable the Magistrate to make up his mind whether the complaint needs to be dismissed or process needs to be issued. If the Magistrate dismisses the complaint, it is in exercise of his powers under Section 203 of the Code of Criminal Procedure. If he issues process, it is in exercise of his powers under Section 204 of the Code of Criminal Procedure.

139. Having clarified the nature of "investigation", which a Magistrate may direct, in exercise of his power under Section 156(3) vis-?-vis Section 202(1), it is also imperative to point out that the report, which a police officer, on completion of investigation, submits in terms of the provisions of Section 173(2) of the Code of Criminal Procedure and which is defined by Section 21 sic-- 2(r) as the police report, the Magistrate may, in terms of Clause (b) of Section 190(1) of the Code, take cognizance, if the police report discloses commission of an offence. The Magistrate, in such a case, may also, instead of taking cognizance, direct, in the light of what has been held in Bhagwant Singh (supra), further investigation.

140. To put it a little differently, it is within the powers of the Magistrate not to accept a police report furnished to him in terms of Section 173(2) and it is open to him to direct the police to carry out further investigation in the matter. Further investigation can, therefore, be directed not necessarily after the police report has been accepted and cognizance taken; rather, even before cognizance is

taken, it is permissible in law for the Magistrate to direct further investigation if he, for reasons to be recorded, in writing, does not accept the police report, which, on completion of investigation, is submitted by the police to the Magistrate.

141. What is however, extremely important to note is that no cognizance can be taken under Section 19(1) of the Prevention of Corruption Act, 1988, on the basis of a police report unless requisite sanction is granted. However, the investigation, which may have been carried out, and the submission of the charge-sheet cannot be said to be without jurisdiction, because Section 19(1) of the Prevention of Corruption Act, 1988, does not prohibit investigation without sanction. What, however, Section 19(1) of the Prevention of Corruption Act, 1988, bars is taking of cognizance of specified offences under the Prevention of Corruption Act, 1988, without sanction having been granted.

142. When, therefore, a charge-sheet is submitted under the Prevention of Corruption Act, 1988, the submission of charge-sheet cannot be treated to be an act, which is without jurisdiction, nor can an act of awaiting sanction be said to be an act wholly without jurisdiction or illegal.

143. On the other hand, if a complaint is made against a person alleging commission of an offence under the Prevention of Corruption Act, 1988, cognizance cannot be taken by a Special Judge in respect of such an offence without sanction. Examining the contents of a complaint to ascertain if allegation of commission of any offence has been disclosed or not cannot be tantamount to taking of cognizance. Without taking, therefore, cognizance, in such case, on the basis of contents of a complaint, the complaint may be sent to police for investigation by taking recourse to the provisions of Section 156(3) Code of Criminal Procedure.

144. In the backdrop of our conclusion that applying for sanction to the sanctioning authority by the Investigating Officer, in a case registered by police on the basis of the First Information Report, is a part of the investigation process and, ordinarily, the police report within the meaning of Section 173(2) of the Code of Criminal Procedure, shall be submitted along with the order, passed by the sanctioning authority, either granting or refusing to grant sanction, so that the Court can decide whether to take or not to take cognizance.

145. It clearly follows that mere submission of charge-sheet without an order of sanctioning authority, either granting or declining to grant sanction, would not bring to an end the stage of investigation and the remand of an accused, against whom no police report, with or without order passed by the sanctioning authority, is submitted to the Court, it is not difficult to follow, and we do conclude, that the Court retains the power, under Section 167(2) of the Code of Criminal Procedure, to continue to remand to custody if the facts of a case so demand. Merely, therefore, the submission of charge-sheet without an order of the sanctioning authority, either granting or declining to grant sanction, would

not ipso facto conclude the investigation and remand of the accused, on submission of such a charge-sheet, has to be treated as part of the investigation process, which is continuing, though investigation by police comes to an end on submission of charge-sheet.

146. Coupled with the above, we have already pointed out above that the scope of granting sanction under Section 197 of the Code of Criminal Procedure is distinctly different from the scope of Section 19(1) of the Prevention of Corruption Act, 1988, and that granting of sanction under Section 19(1) of the Prevention of Corruption Act, 1988, is almost automatic. [See *Lalu Prasad @ Lalu Prasad Yadav Vs. State of Bihar through CBI (AHD)*, Patna, .

Whether trial of an accused under the Prevention of Corruption Act, 1988, without sanction, is wholly without jurisdiction:

147. In the above backdrop of the law, as discussed above, let us, now, determine if trial of an accused under the Prevention of Corruption Act, 1988, without sanction, is wholly without jurisdiction, and consider, in this regard, the provisions of Sections 464 and 465 of the Code of Criminal Procedure. For the purpose of clarity, both the Sections are reproduced below:--

"464. Effect of omission to frame, or absence of, or error in, charge.--(1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may,--

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

465. Finding or sentence when reversible by reason of error, omission or irregularity.--(1) Subject to the provisions hereinbefore contained, on finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the

prosecution unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

(Emphasis is added)

148. A careful and cautious reading of Sections 464 and 465 of the Code of Criminal Procedure, as a whole, would show that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground of any error, omission or irregularity in the charge or in the complaint, summons, warrant, proclamation, attachment etc. unless a failure of justice, in the opinion of the Court, has, in fact, been occasioned thereby; whereas only error or irregularity, in a sanction order which can make a Court of appeal or revision disturb the finding, sentence or order passed by a competent Court, meaning thereby that without sanction, if a finding, sentence or order has been arrived at, such a finding, sentence or order would be ipso facto void ab initio. In other words, if a finding, sentence or order has been reached, without obtaining sanction, such a finding, sentence or order would be void ab initio, no matter as to whether failure of justice has, in fact, been occasioned thereby.

149. Viewed thus, there can be no escape from the conclusion that a finding, sentence or order, arrived at by a competent Court, would be nullity in the eyes of law if sanction under Section 197 of the Code of Criminal Procedure has not been obtained against a public servant from the sanctioning authority irrespective of the fact whether a failure of justice has or has not been caused thereby.

150. As against the above position of law contained in the Code of Criminal Procedure, let us, now, take into account, carefully and cautiously, the provisions of Section 19(3) of the Prevention of Corruption Act, 1988. A careful examination of Section 19(3) of the Prevention of Corruption Act, 1988, shows that if a finding, sentence or order has- been rendered by a Special Judge, such a finding, sentence or order would not be reversed or altered on the ground of not only error or irregularity in the sanction, but also on the ground of omission or absence of sanction.

151. What logically follows from the above discussion is that if a trial has come to an end and a Special Judge, having found an accused guilty of the offence charged with, has convicted and sentenced him accordingly, such a conviction or sentence would not be interfered with by a Court, in appeal or revision, unless the omission or absence of sanction has occasioned or resulted in failure of justice.

152. In the light of the discussions held above, the pertinent question is: whether the requirement of sanction, as demanded by sub-section (1) of Section 19 of the Prevention of Corruption Act, 1988, is a procedural requirement and is, therefore, merely directory and not mandatory?

153. The answer to the question, posed above, has been given recently in *Anil Kumar and Others Vs. M.K. Aiyappa and Another*, which has been relied upon by Mr. Khursid Alam, learned Counsel for the accused-petitioner, wherein it was contended, on behalf of the accused-petitioner, that the requirement of sanction, under sub-section (1) of Section 19 of the Prevention of Corruption Act, 1988, was merely procedural and, hence, directory or else, sub-section (3) of Section 19 of the Prevention of Corruption Act, 1988, would be rendered otiose.

154. Dealing with the above contention raised in *Anil Kumar (supra)*, the Supreme Court has observed that the contention that the requirement of sanction is merely procedural and, therefore, directory is difficult to accept. In this regard, it has been observed, in *Anil Kumar (supra)*, as under:--

"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."

155. Viewed from the above perspective, the requirement of sanction, under Section 19(1) of the Prevention of Corruption Act, 1988, cannot be treated to be merely procedural or directory. Logically extended, this would mean that a Special Judge cannot, in the absence of requisite sanction, take cognizance of an offence under the provisions of the Prevention of Corruption Act, 1988. In other words, Section 19(3) of the Prevention of Corruption Act, 1988, does not enable a Special Judge to ignore the requirement of sanction and freely take cognizance of an offence under the Prevention of Corruption Act, 1988, when sanction has not been granted.

156. In the case at hand, the impugned order, dated 11.9.2013, clearly shows that the learned Special Judge has been conscious of the fact that in the absence of sanction, no cognizance of any offence, under the Prevention of Corruption Act, 1988, can be taken and he has, therefore, eventually (as the impugned order, dated 11.9.2013, reflects) not taken cognizance, though he did take cognizance of offences under the Indian Penal Code, the Arms Act, 1959 and Bihar Examination Control Act, 1981.

Whether a Special Judge, constituted under the Prevention of Corruption Act, 1988, can take cognizance of any offence under the Indian Penal Code or under any special law other than the Prevention of Corruption Act, 1988, if he does not take cognizance of any offence under the Prevention of Corruption Act 1988:

157. Let us, now, turn to the contentious issue, raised, on behalf of the accused-

petitioner, whether a Special Judge, under the Prevention of Corruption Act, 1988, can take cognizance of any offence under the Indian Penal Code or under any special law other than Prevention of Corruption Act, 1988, without having, first, taken cognizance of offence or offences under the Prevention of Corruption Act, 1988.

158. Countering the submission, made on behalf of the accused-petitioner, that no cognizance could have been taken, in the present case, of any offence either under the Indian Penal Code or under any special law other than Prevention of Corruption Act, 1988, without taking, first, cognizance of offence, which the accused-petitioner is alleged to have committed under the Prevention of Corruption Act, 1988, learned Additional Advocate General has submitted that there is no bar in taking of cognizance of offences under the Indian Penal Code or under any special law without taking, first, cognizance of offence under the Prevention of Corruption Act, 1988, if a charge-sheet is submitted for alleged commission of offence by a public servant under the Indian Penal Code and also, at the same time, under the penal provisions of the Prevention of Corruption Act, 1988. Continuing his submissions made in this regard, the learned Additional Advocate - General has also pointed to the provisions of sub-section (3) of Section 4 of the Prevention of Corruption Act, 1988.

159. While considering the present writ petition and in order to appreciate the correctness of the rival submissions, which have been made before us, imperative, we deem it is to take note of Section 3 and Section 4 of the Prevention of Corruption Act, 1988. We, therefore, reproduce hereinbelow the provisions of Section 3 and Section 4 of the Prevention of Corruption Act, 1988:--

"3. Power to appoint special Judges.--(1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many Special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely:--

(a) any offence punishable under this Act; and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

(2) A person shall not be qualified for appointment as a Special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973.

4. Cases triable by Special Judges.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, or in any other law for the time being in force, the offences specified in sub-section (1) of Section 3 shall be tried by Special Judges only.

(2) Every offence specified in Sub-section (1) of Section 3 shall be tried by the Special Judge for the area within which it was committed, or, as the case may be,

by the Special Judge appointed for the case, or where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) When trying any case, a Special Judge may also try any offence, other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, a Special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis."

(Emphasis is supplied)

160. From a combined reading of the provisions embodied in Section 3 and Section 4 of the Prevention of Corruption Act, 1988, what clearly surfaces is that a Special Judge, within the scheme of the Prevention of Corruption Act, 1988, is primarily appointed to try offences punishable under the Prevention of Corruption Act, 1988, and any conspiracy to commit, or any attempt to commit, or any abetment of, any offences punishable under the Prevention of Corruption Act, 1988.

161. In fact, sub-section (1) of Section 4 of the Prevention of Corruption Act, 1988, makes it explicit that the offences, punishable under the Prevention of Corruption Act, 1988, as well as any conspiracy to commit, or any attempt to commit or any abetment of any offences, are to be tried by Special Judges only.

162. The question, therefore, is: whether a Special Judge can try an accused, who is alleged to have committed an offence either under the Indian Penal Code or under any special law other than the Prevention of Corruption Act, 1988, if no offence is alleged to have been committed by such an accused under the Prevention of Corruption Act, 1988, or if no cognizance is taken of any offence under the Prevention of Corruption Act, 1988, by the Special Judge.

163. The answer to the question, posed above, is not very far to seek. A combined reading of Section 3 and Section 4 of the Prevention of Corruption Act, 1988, makes it clear that when trying any case, a Special Judge may also try any offence, other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial. In other words, a Special Judge is appointed, under the Prevention of Corruption Act, 1988, for the purpose of, primarily, trying an offence under the Prevention of Corruption Act, 1988, and any conspiracy to commit or any attempt to commit or any abetment of any of the offences punishable under the Prevention of Corruption Act, 1988. Unless, therefore, a Special Judge has taken cognizance of an offence under the Prevention of Corruption Act, 1988, he does not acquire jurisdiction to take cognizance of any offence under the Indian Penal Code or under any special law, other than the Prevention of Corruption Act, 1988, and/or try any offence under the Indian Penal Code or under any special law other than

the Prevention of Corruption Act, 1988.

164. A cautious and close reading of the provisions of Section 3 and Section 4 of the Prevention of Corruption Act, 1988, particularly, the provisions, embodied in sub-section (3) of Section 4 of the Prevention of Corruption Act, 1988, make it crystal clear that a Special Judge can try an offence, other than the offences under the Prevention of Corruption Act, 1988, only when he is trying a case under the Prevention of Corruption Act, 1988, meaning thereby that it is only when a Special Judge is, otherwise, trying a case under the Prevention of Corruption Act, 1988, that he acquires the jurisdiction and power to try such an accused for any other offence, which may be punishable under the Indian Penal Code or any special law other than the Prevention of Corruption Act, 1988.

165. What logically follows from the above discussion is that if a Special Judge is not trying a case under the Prevention of Corruption Act, 1988, he has no jurisdiction to try any offence either under the Indian Penal Code or under any special law other than, of course, the Prevention of Corruption Act, 1988.

166. It further logically follows from the above discussion that cognizance of an offence punishable under the Prevention of Corruption Act, 1988, has to be taken by Special Judge before he takes cognizance of any offence under the Indian Penal Code or under any special law other than the Prevention of Corruption Act, 1988.

167. Hence, as rightly contended by Mr. Alam, learned Counsel, a Special Judge cannot try an offence under the Indian Penal Code or under any special law, other than the Prevention of Corruption Act, 1988, unless he is already trying a case under the Prevention of Corruption Act, 1988.

168. To put it a little differently, taking of cognizance of an offence punishable under the Prevention of Corruption Act, 1988, is a condition precedent for a Special Judge to acquire jurisdiction to try any offence other than an offence punishable under the Prevention of Corruption Act, 1988.

169. In short, therefore, taking of cognizance of an offence punishable under the Prevention of Corruption Act, 1988, must precede the taking of cognizance of any offence either under the Indian Penal Code or any special law other than the Prevention of Corruption Act, 1988.

Cognizance of what offence or offences was taken in the present case and whether the act of taking of cognizance was within the competence of Special Judge?

170. In the backdrop of the law, as indicated above, let us examine the validity of the impugned order, dated 11.9.2013. This order (when translated in English) reads as follows:--

"11.9.2013. The Investigating Officer has submitted the Charge-sheet No. 409/13, dated 11.9.2013, under Sections 406, 420, 467, 468, 469, 471, 120-B,

384, 353 of the Indian Penal Code, Section 7 read with Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, Section 10 of the Bihar Conduct of Examination Act and Sections 25(1-B)(a), 26 and 30 of the Arms Act, against the two accused persons, namely, Ahmad Ashfaq Karim and Tanveer Alam, with the case diary in-pages. The sanction order, under Arms Act, against the accused persons, namely, Ahmad Ashfaq Karim and Tanveer Alam, has been received, but the sanction order under Prevention of Corruption Act against both the accused persons is yet to be received. Seen. Keep it on record and put up for hearing on the point of cognizance.

Later on 11.9.2013. Heard the prosecution on the point of cognizance. Prosecution has submitted that prima facie, sufficient evidence is available under Sections 406, 420, 467, 468, 469, 471, 120-B, 384, 353 of the Indian Penal Code, Section 7 read with Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, Section 10 of the Bihar Conduct of Examination Act and Sections 25(1-B)(a), 26 and 30 of the Arms Act, against the accused persons, namely, Ahmad Ashfaq Karim and Tanveer Alam in charge-sheet and record filed by the Investigating Officer. Hence, cognizance may be taken against both the accused persons.

Perused the record, case diary, evidence available on record, charge-sheet and all the documents, on perusal, it is evident that sufficient evidence is available for taking cognizance against the accused persons, namely, Ahmad Ashfaq Karim and Tanveer Alam named in the charge-sheet. Hence, cognizance is taken against the accused persons, namely, Ahmad Ashfaq Karim and Tanveer Alam, under Sections 406, 420, 467, 468, 469, 471, 120-B, 384, 353 of the Indian Penal Code, Section 7 read with Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, Section 10 of the Bihar Conduct of Examination Act and Sections 25(1-B)(a), 26 and 30 of the Arms Act. The sanction order under the Prevention of Corruption Act has not been received as yet. It will be considered after receiving the sanction order."

171. A patient and careful reading of the impugned order, dated 11.9.2013, shows that the learned Special Judge did take cognizance, in the initial part of the impugned order, of offences under the Prevention of Corruption Act, 1988, but nullified his own act of taking cognizance in the later part of the order, when he clearly observed that the matter of taking of cognizance, under the Prevention of Corruption Act, 1988, would be taken up on receipt of the requisite sanction.

172. In substance, therefore, the learned Special Judge, in the light of the contents of the impugned order, cannot be said to have taken cognizance of any offence under the Prevention of Corruption Act, 1988, and in the absence of having taking cognizance of any offences under the Prevention of Corruption Act, 1988, his act of taking cognizance of various offences punishable under the Indian Penal Code and/or the Arms Act, 1959, and/or Bihar Conduct of Examination Act, 1981, is wholly without jurisdiction.

173. We have already pointed out that a Special Judge has the jurisdiction to take cognizance of an offence under the Indian Penal Code or under any special law, other than the Prevention of Corruption Act, 1988, provided he has already taken cognizance of any offence punishable under the Prevention of Corruption Act, 1988. Logically extended, it would mean that without taking cognizance of an offence punishable under the Prevention of Corruption Act, 1988, the learned Special Judge's act of taking cognizance of the offences punishable under the Indian Penal Code and/or under the Arms Act, 1959 and/or Bihar Conduct of Examination Act, 1981, is wholly without jurisdiction and void ab initio. The impugned order has to be, therefore, regarded, as already indicated hereinbefore, an order without jurisdiction and non est in law.

Was the remand of the accused-petitioner, to custody, with effect from the date of the passing of the impugned order, dated 11.9.2013. legally sustainable?

174. Reverting back to the facts of the case at hand, it may, once again, be noted that we have already pointed out and held above, at paragraph 171, that the learned Special Judge's act of taking cognizance of the offences punishable under the Indian Penal Code and/or under the Arms Act, 1959, and/or under Bihar Conduct of Examination Act, 1981, is wholly without jurisdiction. The impugned order has to be, therefore, regarded, as already indicated hereinbefore, an order, which is without jurisdiction and void ab initio.

175. Situated thus, it becomes abundantly clear that the act of taking of cognizance under the impugned order, dated 11.9.2013, by the learned Special Judge of offences under the provisions of the Indian Penal Code or of the Arms Act, 1959, or of the offences under Bihar Conduct of Examination Act, 1981, and further progress of the trial, which has been held in the meanwhile, is wholly without jurisdiction and cannot be allowed to survive.

176. What is, now, required to be noted, with utmost care, is that the learned Special Judge took cognizance of the offences under various provisions of the Indian Penal Code and/or under the Arms Act, 1959 and/or under Bihar Conduct of Examination Act, 1981, and, having so taken cognizance, learned Special Judge has been remanding to custody the petitioner, as accused, from time to time. Viewed from this angle, it becomes more than abundantly clear that all orders of remand, subsequent to the impugned order, dated 11.9.2013, aforementioned, are, undoubtedly, under Section 309(2) of the Code of Criminal Procedure.

177. What follows from the above discussion is that the order, dated 11.9.2013, taking cognizance of offences aforementioned is without jurisdiction and cannot be allowed to stand good on record. Consequently, the orders, passed subsequent to the impugned order, dated 11.9.2013, remain on record as orders having been passed pursuant to the Court's power under Section 309(2) of the Code of Criminal Procedure, inasmuch as the orders of remand has been passed after having taken cognizance of offence, which the learned Special Judge, as

already discussed above, has no jurisdiction to take, when he, eventually, not taken cognizance of any of the offence under the Prevention of Corruption Act, 1988.

178. When the order, dated 11.9.2013, taking cognizance of offences aforementioned is without jurisdiction, it, logically speaking, means that the orders of remand aforementioned are also without jurisdiction and must be set aside. As a sequel thereto, the petitioner, as accused in the case aforementioned, needs to be directed to be released forthwith.

Whether the petitioner is a public servant?

179. We may pause here to point out that though a faint attempt was made, on behalf of the petitioner, to contend that the petitioner does not fall within the ambit of the expression "public servant as defined in Section 2 of the Prevention of Corruption Act, 1988, this contention has not been pursued.

180. We, therefore leave the question open as to whether the petitioner is or is not a public servant within the meaning of expression "public servant" as defined in Section 2 of the Prevention of Corruption Act, 1988.

181. We may, however, point out that though the State has filed a charge sheet, in the Court of the learned Special Judge, against the petitioner, as accused, alleging commission of, inter alia, offences under the Prevention of Corruption Act, 1988, the State has not been able to show, clearly and explicitly, that the petitioner is a "public servant" within the meaning of Section 2 of the Prevention of Corruption Act, 1988. Furthermore, though the State Government, upon filing of this writ petition, has written a letter to the University concerned seeking sanction for prosecution of the petitioner, it could not be shown, on behalf of the State, as to who is the competent authority to grant sanction in the facts of the present case, when the petitioner is a trustee of a trust and it is by virtue of his appointment as a trustee that he holds the office of the Managing Director of the College concerned.

182. It is primarily for the State to show that the petitioner falls within the ambit of the definition of the term "public servant" as given in Section 2 of the Prevention of Corruption Act, 1988. On this aspect, respondents have not been able to advance any concrete submission. The respondents have also not been able to show, clearly and explicitly, as to who shall be regarded as the competent authority to grant sanction even if the petitioner is happened to be a public servant within the meaning of the expression "public servant" appearing in Section 2 of the Prevention of Corruption Act, 1988, because the petitioner, admittedly, holds the office, in question, ex-officio, by virtue of his appointment as a trustee.

183. Situated thus, there can be no two opinions that the State has not been able to confidently answer, at this stage, if the petitioner can be prosecuted for an offence under the Prevention of Corruption Act, 1988, and if that be so,

learned Special Judge would have no jurisdiction to try the petitioner for the commission of any of the offences under the Indian Penal Code, and/or under the Arms Act, 1959, and/or under the Bihar Examination Control Act, 1981, inasmuch as a Special Judge, under the scheme of Prevention of Corruption Act, 1988, acquires jurisdiction to try a person under the Indian Penal Code, and/or under the Arms Act, 1959, and/or under the Bihar Examination Control Act, 1981, if the petitioner, as accused, is shown to be public servant within the meaning of expression "public servant", as defined in Section 2 of the Prevention of Corruption Act, 1988, and sanction is granted by a person competent to grant sanction for the prosecution of the petitioner, as accused.

184. In the circumstances indicated above, it would be appropriate, on the part of this Court, to not only set aside the impugned order, dated 11.9.2013, on the ground that the said order is without jurisdiction and, therefore, void ab initio, but also the remand orders, which have been passed subsequent to the impugned order, dated 11.9.2013; the interference by this Court with the remand orders being on the ground that the orders, remanding the petitioner to custody, subsequent to the passing of the impugned order, dated 11.9.2013, are all without jurisdiction. Consequently, as already held above, the petitioner's detention in custody has to be treated wholly without jurisdiction, completely illegal and cannot be allowed to survive.

Conclusions drawn and relief(s) granted:--

185. What surfaces from the above discussion is that in the absence of sanction having been granted for prosecution of the petitioner in terms of the provisions embodied in Section 19(1) of the Prevention of Corruption Act, 1988, no cognizance could have been validly taken by the learned Special Judge of any offence under the provisions of the Indian Penal Code, and/or under the Arms Act, 1959, and/or under Bihar Examination Control Act, 1981, on the basis of the charge-sheet, which has been laid in the present case, and, hence, not only the impugned order, dated 11.9.2013, taking cognizance, but also subsequent orders of remand of the petitioner shall be treated as wholly without jurisdiction inasmuch as till date, there is nothing available on record enabling the learned Special Judge to keep the petitioner in custody.

186. In the backdrop of the facts of the present case and the law relevant thereto, this Court is of the considered view that taking into account the special features of the present case and the law relevant thereto, this Court shall, instead of directing release, forthwith, of the accused-petitioner without any condition having been imposed on the petitioner, direct his release, on bail, until the time the authority, if any, competent to grant sanction, grants sanction for prosecution of the accused-petitioner provided that the petitioner is found or is held to be a public servant within the meaning of Section 2 of the Prevention of Corruption Act. In other words, instead of being set at liberty without any condition having been attached thereto, the petitioner shall be allowed to go and remain on bail until the time learned Special Judge either takes cognizance or

declines to take cognizance of offence under the Prevention of Corruption Act, 1988, in accordance with law.

187. Notwithstanding the conclusion that we have reached above and the directions, which, in our considered view, the petitioner is entitled to receive, we make it clear that it will remain open to the petitioner to challenge the validity of the charge-sheet or the grant of sanction if sanction is granted under Section 19(1) of the Prevention of Corruption Act, 1988, for prosecution of the petitioner.

188. In the result and for the reasons discussed above, this writ petition partly succeeds. The impugned order, dated 11.9.2013, is set aside and quashed. The petitioner is hereby directed to be released on bail on furnishing bail bond of Rs. 25,000/- (twenty five thousand) with two sureties, each of the like amount, subject to the satisfaction of the learned Special Judge, Vigilance-I, Patna, in connection with Special Case No. 32 of 2013 (corresponding to Shastri Nagar Police Station Case No. 213 of 2013). This direction for bail is further subject to the condition that the petitioner shall be allowed to remain on bail until the time either sanction is received or sanction is declined. If the sanction is declined, the charge-sheet shall be submitted to a Court, which is competent to take cognizance of the offences mentioned in the charge-sheet, in question, excluding the penal provisions of the Prevention of Corruption Act, 1988, and if the sanction is granted, the petitioner would be at liberty, if so advised, to put to the challenge of the competence of the authority, who may grant sanction, or to contend that he (petitioner) is not a public servant within the meaning of Section 2 of the Prevention of Corruption Act, 1988, and cannot be, therefore, be tried for any offences under the Prevention of Corruption Act, 1988. With the liberty, as indicated hereinbefore, this writ petition shall stand disposed of with direction as given hereinbefore including the direction to release the petitioner on bail.

S.P. Singh, J.

I agree.