

(2008) 06 KL CK 0035

In the High Court Of Kerala

Case No : Criminal Rev. Petition No. 1255 of 2008

Biju Purushothaman

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 20-06-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 156(1), 156(3), 157, 162
Evidence Act, 1872 — Section 145, 155(3), 157, 159
Penal Code, 1860 (IPC) — Section 120B
Prevention of Corruption Act, 1988 — Section 13, 13(1), 13(2), 7

Citation : (2008) CriLJ 4488 : (2008) 3 ILR (Ker) 42 : (2008) 2 KLJ 625 :
(2009) 1 KLT 901

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : M. Ajay, for the Appellant; P.N. Sukumaran, PP, for the Respondent

Final Decision : Allowed

Judgement

V. Ramkumar, J.—The Revision Petitioner who is the 2nd accused in a private complaint filed by the 2nd respondent herein as CrI.M.P. No. 588 of 2006 before the Court of the Enquiry Commissioner and Special Judge, Thiruvananthapuram, (hereinafter referred to as "the Special Judge") alleging offences punishable under Sections 7 and 13 of the Prevention of Corruption Act, 1988 read with Section 120B I.P.C. challenges Annexure XVII order dated 25-3-2008 passed by the Special Judge ordering Investigation by the Superintendent of VACB, SIU, Thiruvananthapuram, u/s 202(1) Cr.P.C. after concluding an enquiry by the Special Judge himself u/s 202(1) Cr.P.C.

2. I heard Adv. Sri. M. Ajay, the learned Counsel appearing for the revision petitioner and Adv. Sri. P.N. Sukumaran, the learned Public Prosecutor who represented the State. Eventhough the 2nd respondent/complainant (Madathil Marakkar Haji) was duly served, he has not chosen to enter appearance through counsel or oppose this Revision.

3. The allegations in the private complaint filed by the 2nd respondent herein are that in pursuance of the criminal conspiracy hatched by accused Nos. 1 to 4, accused Nos. 2, 3 and 4 who are respectively the two sons and son-in-law of the first accused Vakkom B. Purushothaman had during the period from 15-11-2004 to 28-07-2005 acquired in their names immovable properties worth crores of rupees and thereby A2 to A4 are in possession of assets disproportionate to their known sources of income and that the funds for the acquisition of those assets were provided by the ill-gotten gains of the first accused Vakkom B. Purushothaman by corrupt and illegal means and by abusing his official position as the Finance Minister of the State of Kerala and the four accused persons have thereby committed offences punishable under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988 read with Section 120B I.P.C.

Arguments of the Revision Petitioner/Accused

4. Adv. Sri. M. Ajay, the learned Counsel appearing for the revision petitioner made the following submissions before me in support of the revision:

Annexure-I private complaint filed by the 2nd respondent herein was initially disposed of by the Special Judge as per Annexure III order dated 30-08-2006 directing the Director of Vigilance to conduct a preliminary enquiry into the allegations levelled against the four accused persons. It was further directed that if the materials collected during such enquiry warrant investigation then a case shall be registered and the F.I.R. be forwarded to the Special Court. Thereafter the Director of Vigilance caused a detailed enquiry to be conducted and finally submitted Annexure IV report dated 9-11-2006 as per which it was found that the allegations in the private complaint were not true. Accordingly, on 6-12-2006 the learned Special Judge dismissed the complaint. In CrI. R.P. 734 of 2007 filed by the complainant, this Court had set aside the order of dismissal and had remanded the matter for fresh consideration. After the remit by this Court, the learned Special Judge had heard both sides regarding the procedure to be followed by the Special Court and finally decided to himself conduct an enquiry u/s 202 Cr.P.C. The case was then posted for taking the sworn statement of the complainant. After recording the sworn statement of the complainant. After recording the sworn statement of the complainant the Special Judge examined two other witnesses as CWs 1 and 2 after issuing summons to them. Subsequently, two more witnesses were examined by the Special Judge as CWs 5 and 6. Documents were also got summoned at the instance of the complainant. Finally, as per the impugned order dated 25-3-2008, the learned Special Judge after noting that the complainant does not propose to examine any more witnesses came to the strange conclusion that collection of materials other than those produced in this case is necessary whether the Special Judge should proceed further or not and has accordingly ordered an investigation u/s 202 Cr.P.C. by the Superintendent of Vigilance and Anti Corruption Bureau (Special Investigation Unit), Thiruvananthapuram. Apart from the fact that in the preliminary enquiry initially conducted by the Vigilance Department it was

revealed that A2 the eldest son of A1 is a businessman and A3 the 2nd son of A1 and who is an M.B.A. graduate is also a businessman and A4 who is the son-in-law of A1 is a postgraduate doctor and his wife who is the daughter of A1 is also a postgraduate doctor and that all of them were having independent sources of income and are income tax payers from 1994 onwards, there was absolutely no material to show that A1 while holding office as the Finance Minister had amassed wealth disproportionate to the known sources of his income or that the source of acquisitions by A2 to A4 was traceable to A1. This Court had not set aside Annexure III order passed by the Special Court directing preliminary enquiry. This Court also did not direct the Special Court to exclude Annexure IV report from consideration. When the complainant himself had failed to adduce evidence providing sufficient ground for proceeding further even after getting the assistance of the Special Court for producing documents and examining witnesses, the Special Court was committing a grave illegality in directing an investigation by the vigilance police. Where the Court after postponing the issue of process proceeds to itself conduct an inquiry u/s 202 Cr.P.C. the Court cannot thereafter direct any investigation by the police u/s 202 Cr.P.C. The wording in Sub Section (1) of Section 202 Cr.P.C. is to the effect that the Court may either inquire into the case itself or direct an investigation. When the statute employs the words "either...or" the court has only any one of the two alternatives to follow. In other words, if the Magistrate conducts an inquiry by himself, he cannot thereafter direct an investigation. Conversely, if the Magistrate directs an investigation, he cannot thereafter inquiry into the matter himself. (Vide Sankar Chandra Ghose Vs. Roopraj S. Bhansally, . In Bhagat Ram v. Surinder Kumar and Ors. (2004) 11 SCC 622 what has been held is only that after examination of the complainant and his witnesses u/s 200 Cr.P.C. it is open to the Magistrate to order an investigation u/s 202 Cr.P.C. This does not mean that after the Magistrate himself conducts an enquiry u/s 202(1) Cr.P.C. it is open to him to order an investigation under the said provision. This decision, on the contrary, has held that after postponing the issue of process against the accused, the Magistrate can adopt only any one of the two courses mentioned in Section 202(1) Cr.P.C. in Mohammed Kutty Vs. Mohammed, a learned Single Judge of this Court has observed in paragraph 10 of the report that if the Magistrate is not satisfied after examination of the complainant and his witnesses u/s 200 Cr.P.C. he is obliged to proceed further and conduct an inquiry or investigation u/s 202 Cr.P.C. In Superintendent of Police, C.B.I. Vs. State of Kerala, a learned single Judge of this Court set aside the order passed by the Magistrate forwarding the complaint u/s 156(3) Cr.P.C. and directed an inquiry u/s 202 Cr.P.C. by the Magistrate. In Ravi Vs. Jovatte Francis, also a learned single Judge of this Court held that the option available to the Magistrate u/s 202(1) Cr.P.C. is to either conduct an inquiry by himself or direct an investigation. The power to conduct an inquiry or to direct investigation u/s 202 Cr.P.C. can be exercised only in the alternative and once the Magistrate adopts one course he cannot thereafter proceed to follow the other course.

The State's Contention

5. Adv. Sri. P.N. Sukumaran, the learned Public Prosecutor made the following submissions opposing this Revision:

There is no illegality in the Special Judge ordering investigation by the police after conducting an inquiry u/s 202 Cr.P.C. It is true that this Court did not set aside Annexure IV report of inquiry and therefore, the said report cannot be said to be non est merely because this Court has observed that the Special Judge has no jurisdiction to order preliminary enquiry. But there is nothing wrong in the lower court ignoring Annexure IV report. Preliminary inquiry is a safety device which was proposed by the Apex Court in Sirajudheen's case AIR 1971 SC 520 to protect public servants from ill-motivated and vexatious harassment by persons who might not have received favours from such public servants. There is nothing wrong in the Special Court ordering preliminary inquiry so that if after the conclusion of such inquiry no case is made out for the registration of a crime, the Government machinery need not be wasted and the precious time of the court also can be saved. The investigation ordered in this case by the Special Judge does not call for inference.

Judicial Resolution

Magistrate can conduct inquiry as well as direct investigation u/s 202(1)

6. While I see considerable force in the submission made on behalf of the revision petitioner that the accused persons were being continuously harassed and prosecuted by the 2nd respondent/complainant, I am, however, not inclined to accept the revision petitioner's contention that once the Magistrate himself conducts an inquiry u/s 202(1) Cr.P.C. he cannot thereafter direct an investigation and vice versa, i.e. if he directs an investigation u/s 202(1) Cr.P.C. he cannot thereafter enquire into the matter himself. Section 202 Cr.P.C. reads as follows:

202. Postponement of issue of process - (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit, (and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction/postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding;

Provided that no such direction for investigation shall be made--

a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

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

2) In an inquiry under Sub-section (1), the Magistrate may, if he think fit, take evidence of witness on oath;

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

3) If an investigation under Sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

(emphasis supplied)

The relevant words used in Sub-section (1) of Section 202 Cr.P.C. are "either inquire into the case himself or direct an investigation". The words "either...or" do not necessarily mean that one alone of the two alternatives can be resorted to. Fifth edition of Black's Law Dictionary defines the expression "either" as follows:

Either - Each of two; the one and the other; one or the other of two alternatives, one of two. Often used, however, with reference to more than two, in which case it may mean "each" or "any".

Thus, both the alternatives u/s 202(1) Cr.P.C. are available to the Magistrate. It is true that in Sankar Chandra Ghose Vs. Roopraj S. Bhansally, a Division Bench of the Calcutta High Court has taken the view that the usage of "either...or" in Section 202(1) Cr.P.C. indicates that the intention of the legislature was to empower the Magistrate to employ only one or the other of the two alternatives and the Magistrate cannot employ both the alternatives one after the other. But as mentioned above, the usage "either...or" need not necessarily mean that one alone of the two alternatives can be resorted to by the Magistrate. The Madhya Pradesh High Court in Dr. Kanhaiyalal Modi Vs. Dwarkaprasad Modi and Another, and the Allahabad High Court in Pullo v. State 1987 All. L.J. 1449 have taken a contrary view. I am inclined to accept the views taken by the Madhya Pradesh and Allahabad High Courts to hold that the language of Section 202(1) Cr.P.C. is couched in such a form that there is nothing to indicate that once the Magistrate has conducted an enquiry into the case himself, he cannot thereafter follow the next alternative i.e. direct an investigation or vice versa. I therefore, with due respect disagree with the view taken by the Calcutta High Court in the above decision. In the decisions cited on behalf of the revision petitioner, this aspect of the matter has not been pointedly addressed. Those decisions only observe that the Magistrate can either conduct an enquiry by himself or direct an investigation. Those rulings do not go to the extent of saying that once the Magistrate resorts to one of the two alternatives, he cannot thereafter have recourse to the other alternative.

Whether Rejection or Dismissal?

7. There is yet another aspect on which there appears to be some grey area that may require a little bit of elucidation. The Special Judge had once dismissed the complaint as per Annexure VI order dated 6-12-2006 even before taking cognizance of the offences and even before recording the sworn statement of the complainant. The said dismissal at the pre-cognizance stage was presumably under the misconception that Section 203 Cr.P.C. clothes a Magistrate to do so. It is true that barring Section 204(1) Cr. PC, Section 203 Cr.P.C. appears to be the only enabling provision which empowers a Magistrate to dismiss a complaint. A dismissal of the complaint u/s 204(4) Cr.P.C. for failure to pay process is not a dismissal on merits. But a closer reading of Section 203 Cr.P.C. will reveal that dismissal of a complaint can be done only at the post - cognizance stage. Section 203 Cr.P.C. reads as follows:

203. Dismissal of complaint - If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) u/s 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

Thus, the power of dismissal of the complaint is not available to the Magistrate at the threshold. If after perusing the complaint, the Magistrate is of opinion that the averments therein do not at all spell out any offence, then he should definitely possess the power to throw away the complaint and terminate the matter then and there. This power is not dismissal but rejection. The Magistrate can, in such a case, reject the complaint. (See *Raju Puzhankara v. State of Kerala* 2008 (2) KLT 462. See also *CREF Finance Ltd. Vs. Shree Shanthi Homes Pvt. Ltd. and Another*, *Govind Mehta Vs. State of Bihar*, and *Nagraj Vs. State of Mysore*, .

8. There is still another grey area over which pointed attention does not appear to have been made by Courts. Is it permissible for the Magistrate to dismiss the complaint u/s 203 Cr.P.C. if after recording the sworn statements of the complainant and the witnesses present, the Magistrate is of opinion that there is no sufficient ground for proceeding?. Eventhough a careful reading of Section 203 Cr.P.C. extracted hereinabove will indicate that dismissal of a complaint can be done only after considering the result of enquiry or investigation u/s 202 Cr.P.C. as well, decisions are legion to suggest that a complaint can be dismissed if the Magistrate, after examination of the complainant and his witnesses u/s 200 Cr.P.C. comes to the conclusion that there is no sufficient ground for proceeding. The common yardstick for issuing process u/s 204 Cr.P.C. and for dismissing a complaint u/s 203 Cr.P.C. is the existence or otherwise of "sufficient ground for proceeding". Therefore, when the Magistrate, after examining the complainant and his witnesses present, u/s 200 Cr.P.C. decides to postpone the issue of process u/s 204 Cr.P.C. and embarks upon an enquiry by himself or directs an investigation u/s 202(1) Cr.P.C., he can then be presumed to have formed an opinion that there is no "sufficient ground for proceeding". This is because, the

only criterion for issuing process u/s 204 Cr. PC. is also the existence of "sufficient ground for proceeding". In other words, if after recording the sworn statements of the complainant and his witnesses u/s 200 Cr.P.C. the Magistrate is of opinion that there is no "sufficient ground for proceeding", then he will have to postpone the issue of process and conduct an enquiry or direct an investigation u/s 202(1) Cr.P.C. He cannot, at that stage, dismiss the complaint u/s 203 Cr.P.C. because dismissal of the complaint can be done only after the conclusion of enquiry or investigation u/s 202 Cr.P.C. It is pertinent to remember that the purpose of enquiry and/or investigation u/s 202 Cr.P.C. is also to help the Magistrate to decide whether there is sufficient ground for proceeding further. (See Mohd. Yousuf Vs. Smt. Afaq Jahan and Another, ; Dilawar Singh Vs. State of Delhi, and Rony v. State of Kerala 2000(1) KLT 494 (SC). After the stage of Section 200 Cr.P.C. and before deciding to postpone the issue of process, if, in a rare case the Magistrate is of opinion that no offence has been made out from the statements of the complainant and the witnesses recorded u/s 200 Cr. P.C, then probably, the Magistrate can reject the complaint. If the Magistrate wants to dismiss the complaint, then he may have to necessarily proceed to the stage of Section 202 Cr.P.C. before dismissing the complaint. To put it differently, if the averments in the complaint do not spell out any offence, then the Magistrate can only reject the complaint at the threshold. Likewise, if after examination u/s 200 Cr.P.C. the Magistrate is of opinion that no offence at all has been made out, then also the only course open to him to avoid proceeding u/s 202 Cr.P.C. is by rejecting the complaint. The following observations of the Apex Court in paragraph 10 to CREF Finance Ltd. Vs. Shree Shanthi Homes Pvt. Ltd. and Another, seem to fortify the above conclusion:

The cognizance is taken of the offence and not of the offender and, therefore, once the Court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. One should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the Court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the Court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint.

(emphasis supplied)

9. The legal position can thus be summed up as hereinbelow:

On receipt of a written complaint, the 5 options available to a Judicial Magistrate

who is competent to take cognizance of the case can be summarised as follows:

1) Rejection of complaint

If the complaint on the face of it does not at all make out any offence, then the Magistrate may reject the complaint. This power of rejection at the pre-cognizance stage is inherent in any Magistrate and the said power should not be mistaken for the power of dismissal available to the Magistrate u/s 203 Cr.P.C. since the latter power of dismissal is one which can be exercised only at the post-cognizance stage. (See *Raju Puzhankara v. State of Kerala* 2008 (2) KLT 467 - Also see *CREF Finance Ltd. Vs. Shree Shanthi Homes Pvt. Ltd. and Another*, , *Govind Mehta Vs. State of Bihar*, , *Nagraj Vs. State of Mysore*,

2) Where the Magistrate does not reject the complaint at the threshold, the Magistrate may, without taking cognizance of the offence, order an investigation by the police u/s 156(3) Cr.P.C. and forward the complaint to the officer in-charge of the police station concerned provided that the complaint alleges the commission of a cognizable offence. Such a course can be adopted by the Magistrate only at the pre-cognizance stage. (See *Dilawar Singh Vs. State of Delhi*, & *Suresh Chand Jain Vs. State of Madhya Pradesh and Another*, Even a complaint alleging the commission of offences exclusively triable by a Court of Session can also be so forwarded u/s 156(3) Cr.P.C. (See *Tula Ram and Others Vs. Kishore Singh*, . The Station House Officer ("S.H.O." for short) who receives such a complaint forwarded u/s 156(3) Cr.P.C. will have to treat the complaint as a First Information Report within the meaning of Section 154 Cr.P.C. and is bound to register a crime and proceed to conduct an investigation as provided u/s 157 Cr.P.C. (See *Mohd. Yousuf Vs. Smt. Afaq Jahan and Another*, The S.H.O. is obliged to register a crime whether or not such S.H.O. has the territorial jurisdiction to investigate the offence within the meaning of Section 156(1) Cr.P.C. In a case where the S.H.O. has no territorial jurisdiction, the same to the Police Station having jurisdiction. (See *Madhu Bala Vs. Suresh Kumar and others*, . This power of the Magistrate u/s 156(3) Cr.P.C. cannot be exercised by him after taking cognizance. (See *Tula Ram and Others Vs. Kishore Singh*, - Also see *George v. Jacob Mathews* 1996 (1) KLT 73).

3) Taking Cognizance of the offence

Whether the Magistrate does not order investigation by the police u/s 156(3) Cr.P.C. at the pre-cognizance stage and does not reject the complaint at the threshold, then the magistrate may decide to proceed under Chapter XV Cr.P.C. and thereby take cognizance of the offence provided the allegations in the complaint prima facie make out an offence. If after applying his mind to the allegations made in the complaint the Magistrate takes judicial notice of the accusations and decides to proceed under Chapter XV Cr.P.C., he can then be said to have taken cognizance of the offence. But if the Magistrate, instead of proceeding under Chapter XV Cr.P.C. takes any other action such as issuing search warrant or ordering investigation u/s 156(3) Cr.P.C. then he cannot be

said to have taken cognizance of the offence. (See *D. Lakshminarayana v. V. Narayana* 1976 SC 1672; *Narsingh Das Tapadia Vs. Goverdhan Das Partani and Another*, ; *S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and Others*, .

Where the Magistrate chooses to take cognizance of the offence, he may adopt any of the following alternatives:

a) He shall examine on oath the complainant and the witnesses, if any, present. (See Section 200 Cr.P.C.) This process is popularly called "the recording of sworn statements". But the Magistrate need not examine the complainant and the witnesses u/s 200 Cr.P.C.

i) If the complaint has been made by a public servant acting or purporting to act in the discharge of his official duties; or

ii) if the complaint has been made by a Court or;

iii) if the complaint is made over for enquiry or trial by another Magistrate u/s 192 Cr.P.C. after the examination u/s 200 Cr. P.C (See Clauses (a) and (b) of the first proviso and see the 2nd proviso to Section 200 Cr.P.C.)

Issuing process at the Section 200 Stage

If after examining the complainant and the witnesses or if after perusing the averments in the complaint (in the case of a complaint filed by a public servant or a Court), the Magistrate is of the opinion that there is sufficient ground for proceeding, then he shall, if it is a summons case, issue summons to the accused or if it is a warrant case, issue summons or warrant to the accused (See Section 204(1) Cr.P.C.)

Rejection of Complaint

At this stage also it is doubtful whether the Magistrate can dismiss the complaint because a dismissal of the complaint u/s 203 Cr.P.C. (which appears to be the only enabling provision for dismissal of a complaint on the merits) can only be after considering the result of enquiry or investigation u/s 202 Cr.P.C. as well. Hence, after the stage of examination u/s 200 Cr.P.C. but before the stage of enquiry or investigation u/s 202 Cr. P.C, the appropriate mode of terminating the proceedings may be by way of rejection of the complaint. (See *CREF Finance Ltd. Vs. Shree Shanthi Homes Pvt. Ltd. and Another*, (Para 10) and the discussion at paragraph 8 above).

Section 202 inquiry/investigation

b) If after the stage of Section 200 Cr.P.C. the Magistrate thinks fit to postpone the issue of process against the accused then he has two options before him. He may

i) either himself conduct an enquiry, or

ii) direct an investigation by a police officer or any other person as he thinks fit (Section 202(1) Cr.P.C.)

Whether the accused is residing at a place beyond the territorial limits of the Magistrate, now after the amendment of Section 200 Cr.P.C. by Central Act 25 of 2005 with effect from 23-6-2006, an enquiry by the Magistrate or a direction for investigation u/s 202 Cr.P.C. is mandatory.

Where the offence alleged in the complaint is one triable exclusively by a Court of Session, the Magistrate cannot direct an investigation u/s 202(1) Cr.P.C. (See Clause (a) of the proviso to Section 202(1) Cr. P.C). The Magistrate will have to himself conduct an enquiry during the course of which he shall call upon the complainant to produce all his witnesses and examine them on oath. (See the proviso to Section 202(2) Cr.P.C. Similarly, in all complaints other than those made by a Court a direction for investigation can be made only after the complainant and the witnesses, if any, present have been examined u/s 200 Cr.P.C. (See Clause (b) of the proviso to Section 202(1) Cr. P.C). In the case of a complaint preferred by a Court, the Magistrate can order investigation u/s 202(1) Cr.P.C. even without resorting to Section 200 Cr.P.C. u/s 202(1) Cr.P.C. it is open to the Magistrate to himself conduct an enquiry and/or thereafter order an investigation or vice versa. (See the discussion at paragraph 6 above).

The investigation u/s 202 Cr.P.C. is different from the investigation under Chapter XII of Cr.P.C. The embargo u/s 162 Cr.P.C. against the use of the statements of persons recorded by the Police, applies only to an investigation under Chapter XII of Cr.P.C. as indicated by Section 162 itself. The interdict u/s 162 Cr.P.C., therefore, does not apply to an investigation u/s 202 which provision is located outside Chapter XII Cr.P.C. Hence statements recorded during an investigation u/s 202 Cr.P.C. can be used to contradict the statement given u/s 145 of the Evidence Act, to impeach his credit u/s 155(3), to corroborate his testimony u/s 157 and to refresh his memory u/s 159 of the Evidence Act. (See *Punya Prasad Sankota and Another Vs. Balvadra Dahal and Another*, .

Issuing process after Section 202 enquiry/Investigation

4) If after conducting an enquiry or directing investigation u/s 202(1) Cr.P.C. the Magistrate is of the opinion that there is sufficient ground for proceeding, he shall then issue summons or warrant against the accused u/s 204(1) Cr.P.C. depending on the nature of the case.

The distinction between initiation of proceedings under Chapter XIV Cr.P.C. and commencement of proceedings under Chapter XVI Cr.P.C. has to be borne in mind. Proceedings can commence only after their initiation. (See *S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and Others*, .

Dismissal of complaint after Section 202 enquiry/investigation

5) If after considering the statements on oath of the complainant and the witnesses if any and the result of the enquiry or investigation if any, u/s 202

Cr.P.C. the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint after briefly recording his reasons for doing so. (See Section 203 Cr. P.C).

(See Section 203 Cr.P.C.)

Whether the proceedings are liable to be continued

10. I now proceed to consider whether on the facts and circumstances of the case there was any justification on the part of the Special Judge in ordering investigation by the Vigilance Police. The first accused Vakkom B. Purushothaman was the Finance Minister of the State of Kerala in the previous ministry ruled by the United Democratic Front (UDF) till 18-5-2006. With effect from 18-5-2006 the present Ministry ruled by the (Left Democratic Front) came into power. On 1-8-2006 the 2nd respondent herein filed Annexure I private complaint before the Special Court alleging that the acquisition of certain immovable properties by A2 to A4 who are two of the sons and son-in-law of the first accused, was with the ill-gotten funds provided by the first accused who had abused his position as Finance Minister and that with those acquisitions accused Nos. 2 to 4 were in possession of wealth disproportionate their known sources of income within the meaning of Section 13(1)(e) of the Prevention of Corruption Act, 1988. The 2nd respondent herein further alleged that since the acquisition of those immovable properties was in pursuance of the criminal conspiracy hatched by A1 to A4, the accused thereby committed offences punishable under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988, read with Section 120B of I.P.C.

11. As per Annexure III order dated 30-8-2006 the Special Judge forwarded Annexure I complaint to the Director, Vigilance and Anti Corruption Bureau (VACB) with a direction to conduct a preliminary enquiry into the allegations levelled against the four accused persons and that if materials were collected during such enquiry warranting further investigation, then a case shall be registered and the F.I.R. shall be forwarded to the Special Court. It was further ordered that if sufficient materials were not obtained during such enquiry warranting investigation, a report shall be submitted before the Special Court in that behalf. The Special Court fixed a time limit of 45 days for conducting the preliminary enquiry. The said time limit was subsequently extended till 15-11-2006 at the instance of the Vigilance Department. On 14-11-2006 Annexure IV report dated 9-11-2006 was filed before the Special Court by the Superintendent of Police (VACB, Special Cell), Thiruvananthapuram, duly vetted by the Director of Vigilance as revealed by Annexure V covering letter. Annexure IV report shows that a detailed enquiry was conducted by the Vigilance Department and during the course of enquiry the signed statements of 39 witnesses were recorded to conclude that all the acquisitions made by A2 to A4 during the period from 15-11-2004 to 28-7-2005 were with their own funds and not with any funds made available by Vakkom B. Purushotharnan and that the allegation of criminal conspiracy, amassing of wealth by corrupt or illegal means by any of the accused persons etc. were not at all established by the evidence.

12. Even if political antagonism against the first accused Vakkom B. Purushotharnan could be attributed to the filing of Annexure I private complaint, the fact remains that the Vigilance Enquiry was concluded after the present LDF regime came into power and Annexure IV report was filed nearly six months after the new Ministry came into power. The organisational set up in the Vigilance Department is such that no report is filed before the Special Court without circulating the files through the corridors of power. Thus, even the political rivals of the first accused could not forge a case for registering a crime, much less, for commencing investigation.

13. On receipt of Annexure IV report the learned Special Judge after a detailed examination of the Vigilance enquiry report came to the conclusion that there was no diversion of the funds belonging to the first accused or his wife for purchasing the properties covered by the impugned documents executed in the names of accused Nos. 2 to 4 who were found to be having sufficient resources for purchasing those properties and that the question of under-valuation, if any, of the documents of acquisition in the name of accused Nos. 2 to 4 could not constitute any offence under the provisions of Prevention of Corruption Act. Thereafter, on an anxious consideration of all the aspects of the case the Special Judge concluded that no case was made out against the accused persons and accordingly, as per Annexure VI order dated 06-12-2006 dismissed the complaint. Aggrieved by the dismissal of the complaint, the 2nd respondent herein preferred CrI.R.P.714 of 2007 before this Court. As per judgment dated 11-4-2007 reported in 2007 (4) KLT 59 Madathil Marakkar Haji v. Vakkom B. Purushotharnan a learned Single Judge of this Court set aside Annexure VI order holding that Annexure III order initially passed by the Special Judge directing preliminary enquiry was not proper and was liable to be set aside and accordingly remanded the matter to the Special Court for fresh consideration of the complaint. Even while lawfully discharging his duties, a public servant may not be able to take decisions or steps favourable to all persons who may have approached him seeking his intervention, public servant is bound to displease one party or the other. If disgruntled elements who were not able to curry favours from the public servant were to prosecute him on false and vexatious allegations, no public servant can perform his duties with peace of mind. That explains the desirability, if not necessity, for a preliminary enquiry so that frivolous complaints could be eliminated and the public servant protected from unnecessary harassment. If after such preliminary enquiry it is established that the complaint was ill-motivated, then the police are absolved from registering a crime and commencing a futile investigation. Eventhough two Division Bench decisions namely Satheesh Vs. Enquiry Commissioner and Special Judge, and Mohandas Vs. Enquiry Commissioner and Special Judge, were cited before the learned Single Judge, those decisions were relied on for some other purpose in paragraph 27 of Annexure VIII judgment. In both the cases of Satheesh and Mohandas, preliminary enquiry by the Vigilance Department ordered by the Enquiry Commissioner and Special Judge, Thrissur was upheld by the Division

Bench in the light of P. Sirajuddin, etc. Vs. State of Madras, etc., and the Division Bench only expunged certain observations and findings on the merits in the impugned orders passed by the Enquiry Commissioner and Special Judge. A learned Single Judge of this Court also in Sreekumar S. Menon Vs. State of Kerala, , after setting aside the order passed by the Enquiry Commissioner and Special Judge, Thrissur rejecting the complaint, and directed the Special Judge to order a preliminary enquiry by the Vigilance Department into the allegations against the accused in that case. Reliance was again placed on Sirajudheen's case. Probably, it was noticing this aspect of the matter that the learned Judge only observed in Annexure VIII order that the order passed by the Special Judge directing preliminary enquiry was liable to be set aside. But Annexure III order was not specifically set aside by this Court. After the remand, as permitted by this Court, the Special Judge heard both sides with regard to the procedure to be followed by the Special Judge in the matter and as per Annexure IX order dated 20-11-2007 the Special Judge decided to conduct an enquiry u/s 202 Cr.P.C. after a denovo consideration of the complaint and posted the case for examination of the complaint on 4-1-2008. Subsequently on 22-1-2008 the sworn statement of the complainant was recorded. No other witness for the complainant was present on that day. The complainant then filed Annexure X witness list on that day for the examination of 11 witnesses. The Special Judge issued summons to CWs 1 and 2 in the said witness schedule. On 11-2-2008 CWs 1 and 2 were examined. Summons was then issued to CWs 5 and 6 on the request of the complainant. On 29-2-2008 CW 5 was examined in part. On 18-3-2008 the examination of CW 5 was completed and the statement of CW 6 was recorded. Annexure XI to XV are true copies of the depositions of the complainant and CWs 1, 2, 5 and 6. The complainant then submitted that he does not propose to take steps to the remaining witnesses, and no more documents need be summoned. The complainant prayed for postponing the issue of summons and taking further steps. The case was then posted to 25-3-2003 for orders and on that day the learned Special Judge passed the impugned Annexure XVII order directing an investigation by the Superintendent of VACB u/s 202(1) Cr.P.C. It is in the said order which is assailed in this revision.

14. The basic premise on which the learned Special Judge decided to order an investigation by the Vigilance Department is the misconception that this Court had set aside Annexure III order dated 30-08-2008 passed by the Special Judge directing preliminary enquiry by the Vigilance Department. On that wrong assumption the learned Special Judge came to the conclusion that since Annexure III order directing preliminary enquiry was set aside by this Court, the resultant preliminary enquiry and Annexure IV detailed enquiry report running into 108 pages, were without jurisdiction and non est. If this conclusion of the Special Judge was right, then of course, the Special Judge cannot be found fault with in holding that the only material before court was the result of the examination u/s 200 Cr.P.C. and the result of the enquiry conducted by the Special Judge u/s 202 Cr.P.C. But, as observed earlier, this Court in Annexure VII

judgment did not set aside Annexure III order of the Special Judge directing preliminary enquiry. In fact, the complainant who filed the Crl. Revision before this Court had no prayer to set aside Annexure III order directing preliminary enquiry. Annexure VII is the memorandum of grounds of Crl. Revision filed before this Court by the complainant. The only prayer in that revision was to set aside Annexure VI order dated 6-10-2006. In fact, ground No. 29 of Annexure VII Revision Petition was as follows:

The prayer of the complainant in the complaint is to issue summons to the witnesses and conduct trial. Even though there is no illegality in directing to conduct enquiry into the matter, serious prejudice has been caused to the complainant as he is now precluded from even filing a protest complaint.

(emphasis supplied)

Thus even the complainant was taking the stand that there was no illegality on the part of the Special Judge in ordering preliminary enquiry. Coupled with that two Division Bench decisions of this Court were also cited before this Court. That is presumably why this Court only observed that the order directing preliminary enquiry was liable to be set aside. But this Court did not specifically set aside the said order. The fallacy into which the Special Judge fell, was in wrongly assuming that this Court had set aside Annexure III order directing preliminary enquiry. The consequential finding recorded by the Special Judge was that the resultant preliminary enquiry and report were wholly without jurisdiction. The conclusion reached by the Special Judge is patently erroneous.

15. When there was a very detailed enquiry report by the Vigilance Department before the Special Judge who, after fully accepting the same, had, as per Annexure VI order dated 6-12-2006 dismissed the private complaint filed by the 2nd respondent herein, I am of the view that as long as there is no bar in looking into the said report, a further investigation by the very same Vigilance Department was uncalled for, particularly after the enquiry conducted by the Special Judge himself u/s 202 Cr.P.C. Even the complainant, at one stage of the enquiry, had confessed that he has no more documents to be summoned and no more witnesses to be examined. In the course of the impugned order the learned Special Judge observed as follows:

The complainant and witnesses Nos. 1, 2, 5 and 6 in the list of witnesses have been examined on oath and several records including statements of Bank accounts and Income Tax records produced by them were taken in evidence. But it appears that considering the nature of the allegations, it is not feasible or practical for the complainant to collect and produce the relevant materials if any in this case. As the order of this Court directing Vigilance enquiry passed earlier was already set aside, the materials collected in that enquiry cannot be looked into and that has become non est in law. Having due regard to all facts and attending circumstances, I think it proper and appropriate to order an investigation to be made by a responsible officer of the VACB by invoking the

power u/s 202 Cr.P.C. for the purpose of deciding whether or not there is sufficient ground for proceeding with this matter. In the order of remand passed by the Hon'ble High Court dated 11-4-2007, it is observed that in cases to which Section 202 Cr.P.C. applies the best and the safest course open to the Special Judge will be to conduct an enquiry by himself under the said Section and it is further observed at para 57 that Section 202 of the Code empowers the Magistrate/Special Judge to direct an investigation to be made by police/VACB or by such other person as he thinks fit for the purpose of deciding whether or not, there is sufficient ground for proceeding and such order shall not be issued unless the complainant and witnesses (if any) have not been examined on oath u/s 200 Cr.P.C. and in such investigation also evidence and other relevant materials can be collected and on the basis of such materials, the Special Judge can taken an appropriate decision as to whether the Court has to further proceed with the case or not.

When the complainant himself finds it unable to substantiate his allegations, the Court need not thereupon wear the mantle of an investigator or a prosecutor. The following observations made by a learned Judge of this Court in *Janardhana v. Bindu Purushothaman* 1987 (2) KIT 521 are apposite:

Court enquiring into a complaint, is not required to assume the role of an investigating agency to collect evidence. Inquiry is contemplated by provisions of the Code and the Court may also direct an investigation u/s 156(3) of the Code. But, that does not put the Court in the position of an investigating agency to collect evidence for a complaint who comes before it without positive allegation or material, but with only hearsay information. If the court were to lend itself to such exercises results would be very unwholesome and court would at once be the prosecutor and Judge. Any person without any apparent justification will be in a position to harass any one whom he chooses. Prosecution is entrusted to an independent agency, so that possible harassment or persecution is avoided. If the investigating agency does not act remedy is available to an aggrieved person by way of filing private complaint. But by filing a private complaint on hearsay information, the complainant cannot arrogate to himself the role of the State. A prosecuting machinery to ensure fair investigation by an independent state agency, with necessary checks and balances, including judicial overseeing is evolved. If an interested person is conceded such powers the process can turn inquisitorial or worse. I am not unaware that any aggrieved person can set the criminal law into motion except where there is a statutory bar *A.R. Antulay Vs. Ramdas Srinivas Nayak and Another*, But, that does not confer a right or recognition to be an investigator or a prosecutor. The prosecuting agency is far more, in quality and content than a complainant. This concept has been highlighted by the Supreme Court in *Thakur Ram Vs. The State of Bihar*, .

?the criminal law is not to be used as an instrument of wrecking private vengeance by an aggrieved party against the person who according to that party had caused injury to it. Barring a few exceptions, in criminal matters the party

who is treated at the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book.

I m not inclined to accept the submission that the Magistrate should have aided the complainant in a full fledged investigation like the one that preceds a police charge, to collect evidence and ascertain whether an offence is committed and if so proceed further as a court. Petitioner has no tangible basis whatsoever. Complainant never approached an investigating agency.

It is pertinent to note in this context that the 2nd respondent/complainant has now chosen to remain quiescent presumably for the belated realisation that he has no battle to be won. On the facts and circumstances of the case, I am not persuaded to allow the proceedings against the accused persons to continue and thereby prolong the needless persecution. The impugned order directing investigation by the Vigilance police is accordingly, set aside and all further proceedings in the case shall be dropped. The complaint shall stand dismissed u/s 203 Cr.P.C.

16. In the result, this Crl. Revision is allowed as above.