

(2013) 02 KAR CK 0077

In the Karnataka High Court

Case No : Criminal Petition No. 03 of 2013

Sri. Babu Rao Chinchanasur

APPELLANT

Vs

The State and Sri. M. Shanthappa

RESPONDENT

Date of Decision : 13-02-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 157, 157(1), 157(1)(b), 200
Prevention of Corruption Act, 1988 — Section 13(1)(e), 13(2), 17, 19, 19(1)

Citation : (2014) 3 AKR 161 : (2014) 1 CCR 14 : (2014) CriLJ 3310 : (2013) 3
KarLJ 480 : (2013) 4 KCCR 3245

Hon'ble Judges : K.N. Keshavanarayana, J

Bench : Single Bench

Advocate : Ashok Harnahalli, for Sri. M.S. Bhagwat, for the Appellant; B.A.
Belliappa, Advocate for R-1 and Sri. Jagadeesha B.N., Advocate for R-2, for the
Respondent

Final Decision : Allowed

Judgement

K.N. Keshavanarayana, J.—In this petition filed u/s 482 of Cr.P.C., the petitioner has sought for setting aside the order dated 28.11.2012 passed by the Special Court constituted under the Prevention of Corruption Act, 1988 (for short, "P.C. Act"), for Bangalore Urban District, Bangalore, in PCR No. 44/2012, referring the complaint lodged by Respondent No. 2 herein to the Superintendent of Police, Lokayuktha, Bangalore Urban District, u/s 156(3) of Cr.P.C. for investigation and for quashing the private complaint filed by the 2nd respondent in PCR No. 44/2012, and all further proceedings taken thereon. The 2nd respondent herein presented a private complaint u/s 200 of Cr.P.C. alleging the offence punishable u/s 13(1)(e) r/w. Section 13(2) of the P.C. Act against the petitioner herein and sought for referring the matter for investigation to Lokayuktha Police u/s 156(3) of Cr.P.C., inter alia alleging that the petitioner herein was for the first time elected as a member of Legislative Assembly of Karnataka in 1989, and later in 1994 and 1999 from Chithapur constituency and he was once again elected to the State Legislative Assembly from Gurumitkal constituency in the election held

on 30.05.2008 and since then he has been an MLA; that during 1999 to 2004 he was also a Minister of State for Small Savings, Insurance and Muzarai; that the petitioner has amassed huge assets disproportionate to his known sources of income; that he has filed vague and incorrect statement of his Assets and Liabilities before the Lokayuktha while filing statements as required by Rule 7 of the Karnataka Lokayuktha Rules, 1985; that though he acquired several movable and immovable properties after he became the Member of the State Legislative Assembly, has not disclosed them in his statements of Assets and Liabilities filed before the Lokayuktha; that he also filed incorrect and defective statements before the Election Commissioner; that he has acquired several properties benami in the names of his wife and son-in-law by name one Ramesh; that the total value of the assets held by the petitioner herein both in his name and benami in the names of his wife and others, are worth about Rs. 14,52,08,217/-, the total expenditure from 1989-90 upto 2010-11 was Rs. 45,70,000/-, whereas the total income declared by him was only Rs. 1,56,73,000/- and the liabilities declared by him was to the tune of Rs. 49,00,000/- and thus, the disproportionate assets possessed by him is to the tune of Rs. 12,92,05,217/-, which in terms of percentage works-out to 628% over and above his known sources. In this view of the matter, the complainant alleged that the petitioner herein has acquired assets and cash which was in no way justified by his declared sources of income and thereby he has committed the offence as defined u/s 13(1)(e) of the P.C. Act. It was further alleged that the petitioner herein has not only amassed the assets disproportionate to the declared sources of income, but also indulged in concealing the true assets and undervalued the assets and that the petitioner herein is possessing the assets to the tune of nearly Rs. 50 crores, but the same has been undervalued by him with an intention to conceal the true value of the wealth and thus, he has committed the offence u/s 13(1)(e) punishable Section 13(2) of the P.C. Act. In the complaint, regarding issue of sanction, it was averred that the accused was first time elected in the year 1989, again in 1994 and 1999; that between 1999 and 2004, he was also a Minister in the State Government, but thereafter, he lost the election and ceased to be a public servant, and since the allegations made in the complaint are only with regard to misappropriation of assets during the period when the petitioner herein was a public servant till he lost election in 2004 and while he served as a Minister and since he completed his term as a Minister in 2004, question of sanction does not arise. With these contentions the complainant sought for referring the matter for investigation by Lokayuktha Police u/s 156(3) of Cr.P.C.

2. On receipt of the complaint, learned Special Judge, heard the counsel appearing for the complainant and by order dated 28.11.2012 impugned in this petition, referred the complaint to the Superintendent of Police, Lokayuktha, Bangalore Urban District, u/s 156(3) of Cr.P.C. for investigation and report. On the basis of such reference, the 1st respondent registered the case in Crime No. 94/2012 for the offence punishable u/s 13(1)(e) r/w. 13(2) of the P.C. Act against the petitioner herein. On coming to know of the same, the petitioner has

presented this petition seeking to quash the order passed by the learned Special Judge referring the complaint to Lokayuktha Police for investigation and also to quash the complaint inter alia on the grounds that the private complaint filed by the complainant is not only without jurisdiction inasmuch as there was no provision either in the P.C. Act or in the Karnataka Lokayuktha Act to enable a person to file a private complaint against the public servant and seek initiation of criminal prosecution but also since the Karnataka Lokayuktha Act as well as the P.C. Act being self-contained codes having an independent mechanism for investigation of various offences related to corruption, the complainant has no right to file private complaint; that though the Special Court by the impugned order referred the matter to be investigated by the Superintendent of Police, Lokayuktha, the Police Inspector registered First Information Report and this is contrary to the impugned order, as such, the consequential proceedings thereon, if any, are without jurisdiction; that the registration of the First Information Report by the Police Inspector, Karnataka Lokayuktha is without authority of law and also contrary to Section 17 of the P.C. Act, which mandates that investigation of offences can be done only by the Officers belonging to the cadre of Deputy Superintendent of Police or equivalent rank and that the 2nd proviso to Section 17 mandates that no Police Officer can conduct investigation of offence u/s 13(1)(e), unless there is an order by the Superintendent of Police in that regard and in the absence of an order by the Superintendent of Police, the Police Inspector had no right to register a case and take-up investigation; that the learned Special Judge has failed to notice that mere possession of assets is not an offence and it becomes offence only if the public servant fails to account for the same and since in the instant case the petitioner has been filing his annual statement of assets and liabilities before the Lokayuktha and his wife has also been filing income tax returns, wherein she has accounted all the assets and liabilities held by her, the learned Special Judge has committed error in acting on the mere allegations in the complaint; that the order referring the matter to the Lokayuktha police for investigation is illegal inasmuch as the learned Special Judge has not applied his mind as to whether the allegations made in the complaint makes-out any case, therefore, such an order is liable to be quashed, as held by Division Bench of this Court in Guruduth Prabhu and Others Vs. M.S. Krishna Bhat and Others, that the learned Special Judge has failed to see that the person referred to as Ramesh in the complaint is not the son-in-law of the petitioner and the said person has no connection whatsoever with this petitioner, as such, the assets held by the said Ramesh cannot be in any way connected to this petitioner; that since the allegation made in the complaint does not disclose the commission of any offence, the same is required to be quashed to prevent the abuse of the process of law; that the private complaint filed without accompanied by an order of sanction for prosecuting the petitioner as required by Section 19 of the P.C. Act, was not maintainable, as such, the learned Special Judge could not have entertained the complaint and referred the same for investigation to the police.

3. Upon service of notice of this petition the respondents have appeared through their counsel. I have heard Sri. Ashok Haranahalli, learned Senior Counsel appearing for the petitioner, Sri. B.A. Belliappa, learned Standing Counsel appearing for the 1st Respondent-Lokayuktha and Sri. Jagadeesh B.N., counsel appearing for the 2nd respondent.

4. In support of the prayer sought in the petition though several grounds have been urged in the petition, learned Senior Counsel appearing for the petitioner, during the course of arguments, laid stress on the following points.-

i) The private complaint alleging the offence punishable u/s 13(1)(e) of the P.C. Act by a private individual is not maintainable, therefore, the Special Court has no jurisdiction to entertain such a complaint and refer the same to the police for investigation.

ii) There has been total lack of application of mind by the learned Special Judge before referring the complaint to police u/s 156(3) of Cr.P.C. for investigation, as such, the impugned order is contrary to the principles of law laid down in catena of decisions in this regard.

iii) As per the 2nd proviso to Section 17 of the P.C. Act, an offence referred to under Clause (e) of Sub-section (1) of Section 13 shall not be investigated without the order of a Police Officer not below the rank of Superintendent of Police. Therefore, the impugned order directing investigation to the allegations made in the complaint regarding the offence referred to in Clause (e) of Sub-section (1) of Section 13 of the P.C. Act is without jurisdiction and it has violated the protection afforded to the public servant against investigation of a false and vexatious complaint.

iv) The sanction for prosecution as required by Section 19 of the P.C. Act is a condition precedent to entertain a private complaint alleging the offences under the P.C. Act and since no such sanction accorded by the competent authority was produced, the learned Special Judge had no jurisdiction to entertain the complaint and refer the same to the police for investigation.

5. Per contra, learned counsel appearing for the Respondents-contended that a private complaint alleging the offence punishable u/s 13(1)(e) by a private individual is maintainable as laid down by the Apex Court in the Constitutional Bench decision in the case of A.R. Antulay Vs. Ramdas Srinivas Nayak and Another, which has been reiterated in the case of Dr. Subramanian Swamy Vs. Dr. Manmohan Singh and Another, It was further contended that perusal of the impugned order clearly indicates application of mind by the learned Special Judge to the allegations made in the complaint and his satisfaction about the prima facie case having been made-out for directing investigation. Therefore, the impugned order does not suffer from any illegality or irregularity. They further contended that though the 2nd proviso to Section 17 mandates that the investigation for an offence referred to u/s 13(1)(e) of the P.C. Act shall be undertaken only pursuant an order passed by a Police Officer not below the rank

of Superintendent of Police, that does not over-ride the power of the Court to direct investigation. It is further contended that since the learned Special Judge has directed investigation to be done by the Superintendent of Police, Karnataka Lokayuktha, the protection, if any, afforded to the public servant by virtue of 2nd proviso to Section 17 has not been in any way defeated. It was further contended that the requirement of sanction as provided by Section 19 of the P.C. Act is only at the stage of the Court taking cognizance, and there is no bar or prohibition for the Special Court to entertain the complaint and direct investigation. On the issue of sanction they contended that, specific allegations have been made in the complaint to the effect that since the allegations regarding disproportionate assets relate to the period while the petitioner herein was severing as a Minister and since he completed his term as a Minister in the year 2004, question of sanction does not arise, therefore, in the light of the said specific averments and in the light of the ratio laid-down by the Apex Court in the case of *Lalu Prasad @ Lalu Prasad Yadav Vs. State of Bihar* through CBI (AHD), Patna, , question of sanction does not arise. Therefore, the learned counsels appearing for the respondents sought for dismissal of the petition.

6. In the light of the submissions made by the learned counsel on both sides, the points that arise for consideration are,-

- i) Whether a private complaint alleging the offence punishable u/s 13(1)(e) of the P.C. Act by a private individual is maintainable.
- ii) Whether even at the stage of referring the complaint to the police u/s 156(3) of Cr.P.C. for investigation, the Special Judge is under an obligation to apply his mind to the allegations made in the complaint.
- iii) Whether in the light of the mandatory provisions contained in the 2nd proviso to Section 17 of the P.C. Act, the Special Judge has jurisdiction to direct investigation in exercise of the power u/s 156(3) of Cr.P.C. in respect of the allegations relating to the offence punishable u/s 13(1)(e) of the P.C. Act.
- iv) Whether the sanction for prosecution as required by Section 19 of the P.C. Act is a condition precedent to entertain a private complaint alleging the offences under the P.C. Act.

Regarding Point No. 1:

7. This question of law has been answered in the affirmative by the Apex Court in *A.R. Antulay's* case (supra). Following the Constitutional Bench decision in *A.R. Antulay's* case, recently the Apex Court in *Subramanian Swamy's* case referred to supra, has observed thus in Para-28, which reads as under:-

28. There is no provision either in the 1988 Act or the Code of Criminal Procedure, 1973 (Cr.P.C.) which bars a citizen from filing a complaint for prosecution of a public servant who is alleged to have committed an offence. Therefore, the argument of the learned Attorney General that the appellant cannot file a complaint for prosecuting respondent No. 2 merits rejection. A

similar argument was negated by the Constitution Bench in A.R. Antulay -Vs- R.S. Nayak.

8. After referring to the observations of the Apex Court in A.R. Antulay's case (supra), Their Lordships in Subramanian Swamy's case at Para-33 have observed thus:-

33. In view of the aforesaid judgment of the Constitution Bench in Antulay's Case, it must be held that the appellant has the right to file a complaint for prosecution of respondent No. 2 in respect of the offences allegedly committed by him under the 1988 Act.

Therefore, in the light of the law laid-down in the aforesaid decisions, I find no substance in the argument canvassed regarding the locus-standi of the complainant to file a private complaint. Hence, I answer Point No. 1 in the affirmative.

Regarding Point No. 2:

9. The question as to whether the Magistrate at the time of referring the complaint to the police u/s 156(3) of Cr.P.C. for investigation is required to apply his mind to the allegations made in the complaint came-up for consideration before a Division Bench of this Court in the case of Guruduth Prabhu and Others Vs. M.S. Krishna Bhat and Others, wherein, Their Lordships referring to the provisions of Sections 156 and 157 of Cr.P.C. have held that the Magistrate should apply his mind and find-out whether the allegations made in the complaint filed u/s 200 of Cr.P.C. discloses an offence. The relevant observations in this regard are found in Para-11, which reads as under:-

11. "Sub-section (3) of Section 156 Cr.P.C., empowers Magistrate to order an investigation. u/s 157(1), Cr.P.C. an officer in charge of a Police Station having reason to suspect the commission of an offence which he is empowered u/s 156, Cr.P.C. to investigate should send a report to the Magistrate empowered to take cognizance of the offence upon a Police report and should proceed in person or depute one of his prescribed deputies to proceed to the spot to investigate u/s 157(1)(a) when the offender is named and if the case is not of a serious nature the officer need proceed in person or depute his subordinate. u/s 157(1)(b) if it appears to such Police Officer that there is no sufficient ground for entering on an investigation he shall not investigate the case and the officer should inform the complainant under the prescribed manner. Thus, the Police Officer who is empowered to investigate on the information received by him of the commission of a cognizable offence can decide whether there is no sufficient ground for entering into an investigation and if there is no sufficient ground he should not investigate the case. But once the Magistrate orders an investigation u/s 156(3), Cr.P.C. the Police Officer is bound to investigate the matter and there is no question of his deciding not to investigate. Thus, by an order of the Magistrate u/s 156(3) the discretion given to the Police Officer u/s 157 is taken away. It is therefore very important that the Magistrate applies his mind and finds that the

allegations made in the complaint filed u/s 200, Cr.P.C. before him discloses an offence. If every complaint filed u/s 200, Cr.P.C. is referred to the police u/s 156(3) without application of mind about the disclosure of an offence, there is every likelihood of unscrupulous complainants in order to harass the alleged accused named by them in their complaints making bald allegations just to see that the alleged accused are harassed by the police who have no other go except to investigate as ordered by the Magistrate. Therefore, it is mandatory for the Magistrate to apply his mind to the allegations made in the complaint and in only cases which disclose an offence, the Magistrate gets jurisdiction to order an investigation by the police if he does not take cognizance of the offence. xxx xxx xxx xxx.

10. In the case of Maksud Saiyed Vs. State of Gujarat and Others, the Apex Court has considered the requirement of the application of mind by the Magistrate before exercising jurisdiction u/s 156(3) of Cr.P.C. and has observed thus in Para-

13:-

13. "Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156 (3) or Section 200 of the Code of Criminal Procedure, the magistrate is required to apply his mind. Xxx xxx xxx xxx.

11. Reading of Section 5 of P.C. Act makes it clear that the Special Judge is deemed to be a Magistrate.

12. In the light of the above decisions, it is mandatory on the part of the Special Judge to apply his mind to the allegations made in the complaint to find-out as to whether it discloses any offence and whether it is necessary to refer the complaint to the police for investigation. Point No. 2 is answered accordingly in the affirmative.

Regarding Point No. 3:

13. Section 17 of the P.C. Act deals with the officers who are authorized to investigate the offences punishable under the Act Section 17 in its entirety reads as under:

17. Persons authorized to investigate-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank,-

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) In the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of Section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;

(c) Elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank, shall investigate any offence punishable under this Act without

the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefore without a warrant:

Provided that if a police officer not below the rank of an Inspector of Police is authorized by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefore without a warrant:

Provided further that an offence referred to in clause (e) of sub-section (1) of Section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.

14. Clauses (a) to (c) of Section 17 directs that no police officer below the rank enumerated therein shall investigate any offence punishable under the Act without the order of a Metropolitan Magistrate or a Magistrate of the first class or make any arrest thereon without any warrant. In otherwards, the police officers enumerated in Clauses (a) to (c) are authorized to investigate any offence punishable under the Act without an order of the Metropolitan Magistrate or a Magistrate of the first class and a police officer below in rank than the one enumerated in Clauses (a) to (c) may investigate any offence punishable under the Act only with the order of the Metropolitan Magistrate or a Magistrate of the first class.

15. The first proviso to Section 17 of the P.C. Act empowers any police officer not below the rank of an Inspector of Police, if authorized by the State Government in that behalf by a general or a special order to investigate any such offence without the order of the Metropolitan Magistrate or a Magistrate of the first class. However, the 2nd proviso to Section 17 directs that the offence referred to under Clause (e) of sub-section (1) of Section 13 of the P.C. Act shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police. Thus, from the 2nd proviso, it is clear that an investigation into the offence referred to in Clause (e) of sub-section (1) of Section 13 of the P.C. Act even by any police officer enumerated in Clauses (a) to (c) or any Police Officer authorized in that behalf by the State Government as per the first proviso, can be undertaken only by an order of the police officer not below the rank of Superintendent of Police. Thus, the 2nd proviso is in the nature of additional safe guard for the public servant who are accused of the offence punishable u/s 13(1)(e) of the P.C. Act against an investigation by a police officer without the knowledge and consent of superior police officer not below the rank of Superintendent of Police. A Superior Police Officer of the rank of Superintendent of Police or any officer higher in rank is required to pass an order before an investigation, if any, for such offence is commenced. It is needless to point-out that, before directing such investigation, the Superintendent of Police or an officer superior to him is required to apply his mind to the information and come to an opinion that the investigation on such allegations is necessary.

16. In the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, the Apex Court while considering the provisions of Section 5A of P.C. Act, 1947 which corresponds to Section 17 of P.C. Act 1988, has held that the said proviso is mandatory. In the said decision, Their Lordships have observed thus in Paragraphs- 122 to 124:-

122. According to Section 5A, notwithstanding anything contained in the Code, no police officer below the rank specified in clauses (a) to (d) of Section 5-A(1), shall investigate any offences punishable under Sections 161, 165 or 165A of the Indian Penal Code or u/s 5 of the Act without the order of a Presidency Magistrate or a Magistrate of the First Class as the case may be or make arrest therefor without a warrant. There are two provisos to that section. As per the first proviso, if a police officer not below the rank of an Inspector of Police is authorised by the State Government, either by general or special order, he may investigate any such offence without the order of a Magistrate or make arrest therefor without a warrant. According to the second proviso, an offence referred to in clause (e) of Sub-section (1) of Section 5 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.

123. It means that a police officer not below the rank of an Inspector of Police authorised by the State Government in terms of the first proviso can take up the investigation of an offence referred to in clause (e) of Section 5(1) only on a separate and independent order of a police officer not below the rank of a Superintendent of Police. To say in other words, as strict compliance of the second proviso is an additional legal requirement to that of the first proviso for conferring a valid authority on a police officer not below the rank of an Inspector of Police to investigate an offence falling under clause (e) of Section 5(1) of the Act. This is clearly spelt out from the expression "further provided" occurring in the second proviso".

124. A conjoint reading of the main provision, Section 5A(1) and the two provisos thereto, shows that the investigation by the designated police officers is the rule and the investigation by an officer of a lower rank is an exception.

17. In State of Madhya Pradesh and Others Vs. Shri Ram Singh, the Apex Court considering the purport of second proviso to Section 17 of P.C. Act, 1988 has held thus in Paragraph-12:

Xxx xxx xxx Second proviso provides that where an offence referred to in clause (e) of sub-section (1) of Section 13 is sought to be investigated, such an investigation shall not be conducted without the order of a police officer not below the rank of superintendent of police xxx xxx xxx.

18. The Apex Court in the case of State Inspector of Police Vs. Surya Sankaram Karri, had an occasion to consider the provisions of Section 17 of the P.C. Act and it is observed thus in Paragraph-13:-

13. Provisions of the 1988 Act, no doubt, like the 1947 Act seek to protect public

servant from a vexatious prosecution. Section 17 provides for investigation by a person authorized in this behalf. The said provision contains a non-obstante clause. It makes investigation only by police officers of the ranks specified therein to be imperative in character. The second proviso appended to Section 17 of the Act provides that an offence referred to in clause (e) of sub-Section (1) of Section 13, shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police. Authorization by a Superintendent of Police in favour of an officer so as to enable him to carry out investigation in terms of section 17 of the Act is a statutory one. The power to grant such sanction has been conferred upon the authorities not below the rank of Superintendent of Police. The proviso uses a negative expression. It also uses the expression "shall". Ex-facie it is mandatory in character. xxx xxx xxx xxx.

(Underlining is by me)

19. This Court in the case of State of Karnataka Vs. B. Narayana Reddy, after referring to the observations of the Apex Court in Bajanlal's case extracted above, has observed thus at Para-8:

It was next observed in paragraph 125 that in several decisions of the Supreme Court, Section 5A of the Act (Section 5-A(1) of the 1947 Act corresponds to Section 17 of the 1988 Act) is mandatory and not directory, and the investigation conducted in violation thereof bears the stamp of illegality, but that illegality committed in course of an investigation does not affect the competence and the jurisdiction of the Court for trial, and where the cognizance of the case has in fact been taken and the case is proceeded to termination, the validity of the proceedings with the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby, but that, however, in H.N. Rishbud -Vs- State of Delhi and in Muni Lal -Vs- Delhi Administration, it is held that if any breach of the said mandatory provision relating to investigation is brought to the notice of the Court at an early stage of the trial, the Court will have to consider the nature and extent of the violation and pass appropriate orders as may be called for to rectify the illegality and to cure the defects in the investigation.

In the case concerned, the Supreme Court, while maintaining the first information report and the registration of the case, nevertheless, quashed the commencement as well as the entire investigation done till then on the ground that the investigating officer concerned had not been clothed with legal authority to take up investigation and proceed with the same within the meaning of Section 5-A(1) of the 1947 Act (corresponding to Section 17 of 1988 Act). The Supreme Court also gave liberty to the State Government to direct investigation afresh, through a competent police officer empowered with valid legal authority in strict compliance with Section 5-A(1) of 1947 Act (corresponding to Section 17 of the 1988

Act). xxx xxx xxx xxx xxxx.

20. From the above it is clear that the provisions of the 2nd proviso to Section 17 is an additional safe-guard and protection in relation to the investigation of the offence referred to in Clause (e) of sub-section (1) of Section 13.

21. Of course, reading of Sections 200 to 204 and Section 190 of Cr.P.C. indicates that on receipt of the private complaint, the Special Judge has different options in the matter of proceeding further. On receipt of a private complaint, if the Magistrate on application of his mind to the allegations made in the complaint and the documents, if any produced, is satisfied about the existence of the prima facie case, he may take cognizance of the offence as provided by Section 200 r/w. Section 190(1)(a) of Cr.P.C. and proceed to examine the complainant on oath and the witnesses, if any present. If he is of the opinion that, on the complaint made to him, he is not competent to take cognizance of the offence, as provided by Section 201, he shall return the complaint to the complainant for presentation to the proper court, if the complaint is in writing and if the complaint is not in writing, direct the complainant to the proper Court. Even after recording the statement of the complainant and his witnesses, if any, on oath, if the Special Judge is not satisfied about the prima facie case for issue of process to the person named as accused, he may post-pone the issue of process as per Section 202 and either enquire into the case by 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. Even after considering the statement of the complainant and of the witnesses, if any on oath and also result of the enquiry or investigation u/s 202, if the Special Judge is of the opinion that there is no sufficient ground for proceeding, he may dismiss the complaint as provided by Section 203. If the Special Judge is satisfied on the statements of the complainant and the witnesses, if any, on oath and the result of the enquiry or investigation that there are sufficient grounds to proceed further, he may issue process to the person named as accused as provided by Section 204 of Cr.P.C. If the Special Judge does not choose to adopt the aforesaid options, he may, in exercise of power u/s 156(3) of Cr.P.C. refer the complaint to a police officer for investigation, in which event, it is well-settled legal position that it is an order passed in pre-cognizance period.

22. As noticed supra, while discussing Point No. 2, even at the stage of referring the complaint for investigation in exercise of power u/s 156(3), the Special Judge is under an obligation to apply his mind and satisfy himself that the investigation is called for.

23. In the light of the mandate of the 2nd proviso to Section 17 and the additional safeguard and protection afforded therein, where the complaint relate to an offence referred to under Clause (e) of sub-section (1) of Section 13, if the Special Judge, on receipt of a private complaint does not adopt the procedures contemplated u/s 200 to 204, instead, wanted to refer the complaint for investigation in exercise of power u/s 156(3) of Cr.P.C. in my opinion, such

investigation can be only in accordance with Section 17 of the P.C. Act. In the light of the 2nd proviso to Section 17, in my opinion, a complaint alleging the offence referred to in Clause (e) of sub-section (1) of Section 13, required to be referred to a police officer of the rank of Superintendent of Police or the officer higher in rank, who on receipt of such reference will have to apply his mind and if he is satisfied that an investigation is necessary, he is under an obligation to pass an order directing investigation by any one of the officers enumerated therein. If this mode is not adopted, it would defeat the statutory provisions of 2nd proviso to Section 17 and also would take-away the safeguard and protection afforded to a public servant against an investigation of a frivolous or vexatious complaint. For this view of mine, I draw support from the decision of the Apex Court in the case of Jamiruddin Ansari Vs. Central Bureau of Investigation and Another. In this decision, the Apex Court has considered the effect of various provisions of Maharashtra Control of Organized Crime (MCOC) Act. Section 9 of MCOC Act empowers the Special Court constituted under the said Act to take cognizance of any offence without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. Sub-section (4) of Section- 9 sets out the powers of the Special Court to the effect that, the Special Court shall, for the purpose of trial of any offence, shall have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, so far as may be, in accordance with the procedure prescribed in the Code for the trial before a Court of Session.

24. Section- 23 of the said Act deals with the cognizance of, and investigation into, an offence. The said section has a non-obstante clause. The provisions of the said section has the over-riding effect on the Code of Criminal Procedure. As per Clause (a) of Sub-section (1) of Section 23 of the said Act, "No information about the commission of an offence of organized crime under this Act, shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police and as per sub-section (2) of Section 23, no Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police.

25. After extracting Sections 9 & 23 of the said Act, the Apex Court has observed in Paragraphs- 65 and 66, thus:-

65. xxx xxx xxx xxx xxx xxx xxx

The wording of Sub-Section (2) of Section 23 leaves no room for doubt that the learned Special Judge cannot take cognizance of any offence under MCOCA unless sanction has been previously given by the police officer mentioned hereinabove. In such a situation, even as far as a private complaint is concerned, sanction has to be obtained from the Police Officer not below the rank of Additional Director General of Police, before the Special Judge can take cognizance of such complaint.

66. Accordingly, the provisions of Section 9(1) will have to be read in harmony with the provisions of Section 23(2) as far as private complaints are concerned., and we have no hesitation in negating the majority view of the Full Bench holding otherwise.

In Paragraphs 68 & 69, the Apex Court has observed thus:-

68. As indicated hereinabove, the provisions of Section 23 are the safeguards provided against the invocation of the provisions of the Act which are extremely stringent and far removed from the provisions of the general criminal law. If, as submitted on behalf of some of the respondents, it is accepted that a private complaint u/s 9(1) is not subject to the rigours of Section 23, then the very purpose of introducing such safeguards lose their very *raison d'être*. At the same time, since the filing of a private complaint is also contemplated u/s 9(1) of MCOCA, for it to be entertained it has also to be subject to the rigours of Section 23. Accordingly, in view of the bar imposed under Sub-Section (2) of Section 23 of the Act, the learned Special Judge is precluded from taking cognizance on a private complaint upon a separate inquiry u/s 156(3) Cr.P.C. The bar of Section 23(2) continues to remain in respect of complaints, either of a private nature or on a police report.

69. In order to give a harmonious construction to the provisions of Section 9(1) and Section 23 of MCOCA, upon receipt of such private complaint the learned Special Judge has to forward the same to the officer indicated in Clause (a) of Sub-Section (1) of Section 23 to have an inquiry conducted into the complaint by a police officer indicated in clause (b) of Sub-Section (1) and only thereafter take cognizance of the offence complained of, if sanction is accorded to the Special Court to take cognizance of such offence under Sub-Section (2) of Section 23.

26. In the light of the mandate of 2nd proviso to Section 17, the principles laid-down by the Apex Court in Jamiruddin Ansari's case would, in my opinion, apply to a private complaint filed before the Special Court alleging the offence referred to under clause (e) of sub-section (1) of Section 13. In such cases, the special Judge, on receipt of the complaint, if he is of the opinion that an investigation is called for regarding the allegations made therein, he is required to send the same to the Superintendent of Police, who in turn should act in accordance with the 2nd proviso to Section 17 and proceed further.

27. Of course, in the impugned order, the learned Special Judge has directed the Superintendent of Police, Karnataka Lokayuktha, Bangalore Urban, to conduct investigation. However, such a reference could be only for the purpose of the Superintendent of Police to act in accordance with the 2nd proviso to Section 17. Accordingly, I answer Point No. 3.

Regarding Point No. 4:

28. Section 19(1) of the P.C. Act directs that no Court shall take cognizance of the offence punishable under Sections- 7, 10, 11, 13 & 15 alleged to have been

committed by the public servant, except with the previous sanction of the authorities enumerated in Clauses (a) to (c). Of course, apparent reading of section would indicate that the requirement of previous sanction is contemplated at the time of the Court taking cognizance. In the case on hand, of course, the learned Special Judge has not taken cognizance since he chose to refer the complaint for investigation in exercise of power u/s 156(3) of Cr.P.C. Therefore, the impugned order is the one passed during pre-cognizance period.

29. In Subramanian Swamy's case referred to supra, the Apex Court while rejecting the argument of learned Attorney General that the question of granting sanction for prosecution of a public servant charged with an offence under the 1988 Act arises only at the stage of taking cognizance and not before, has ruled thus in Paragraphs-34 and 64:

34. The argument of the learned Attorney General that the question of granting sanction for prosecution of a public servant charged with an offence under the 1988 Act arises only at the stage of taking cognizance and not before that is neither supported by the plain language of the section nor the judicial precedents relied upon by him. Though, the term "cognizance" has not been defined either in the 1988 Act or Cr.P.C. the same has acquired a definite meaning and connotation from various judicial precedents. In legal parlance cognizance is "taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially.

64. I also entirely agree with the conclusion of the learned brother Singhvi, J., that the argument of the learned Attorney General that question for granting sanction for prosecution of a public servant charged with offences under the 1988 Act arises only at the stage of cognizance is also not acceptable. In formulating this submission, the learned Attorney General substantially advanced two contentions. The first contention is that an order granting sanction is not required to be filed along with a complaint in connection with a prosecution u/s 19 of the P.C. Act. The aforesaid submission is contrary to the settled law laid down by this Court in various judgments.

64.1. Recently a unanimous three-judge Bench decision of this Court in State of Uttar Pradesh -Vs- Paras Nath Singh, speaking through Justice Pasayat J. and construing the requirement of sanction, held that without sanction: (SCC p.375, para 6)

6.... "10... The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word "cognizance" means "jurisdiction" or "the exercise of jurisdiction or "power to try and determine causes". In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty." *

(Emphasis supplied)

30. Following the above ruling of the Apex Court, this court in the case of B.V. Acharya Vs. N. Venkateshaiah (W.P. No. 14047/2012 Disposed Off on 03.08.2012), has considered the question as to whether a sanction for prosecution as contemplated by Section 19(1) is condition precedent for entertaining the private complaint alleging offence under the P.C. Act and has held thus in Paragraph-60:

60. Thus, it is clear from the aforesaid decision of the Apex Court that the requirement of sanction order cannot be dispensed with even in respect of a private complaint filed by a citizen against a public servant alleging offences under the P.C. Act said to have been committed while discharging public duty as a public servant.

Thereafter, His Lordship has considered the question, " Can a private complaint without the sanction order being accompanied be entertained by the Court while invoking power u/s 156(3) of Cr.P.C. After referring to the contentions of the learned counsels on this point and also referring to the decisions of the Apex Court, it has been held in Paragraph-66 that since the private complaint was not accompanied by the sanction order from the competent authority, the order of the learned Special Judge will have to be held as without jurisdiction.

31. In the order impugned in this petition passed by the learned Special Judge, there is absolutely no consideration regarding the question as to whether a private complaint which is not accompanied by a sanction order from the competent authority was maintainable. Of course, in the complaint a specific averment has been made in paragraph-114 on the issue of sanction. According to the complainant, the petitioner-accused was first elected in the year 1989, again in the year 1994 and 1999, and continued till 2004. It is further stated therein that during the period 1999 to 2004 he was also a Minister for Lotteries and Small Savings, Insurance and Muzarai and thereafter, he lost the election and ceased to become public servant. It is further stated therein that allegations made in the complaint with regard to misappropriation of assets during his office in the last elections and while he was serving as a Minister, and since he has completed his term as Minister in 2004, question of sanction does not arise. In other words, it is the contention of the complainant that, no sanction is required as the corrupt acts alleged relate to the office which the petitioner has since demitted. Of course, the Apex Court in *Lalu Prasad Yadhav and Subramanian Swamy Cases* referred to supra has ruled that, if the corrupt acts alleged relate to the office which the public servant held and if he had demitted that office or if he holds a different position or office, no sanction or permission for prosecution is required.

32. It is not in dispute that in the subsequent election held on 30.05.2008, the petitioner was elected from Gurumitkal Constituency and as on the date of the institution of the complaint, he is a sitting M.L.A. Except for the period between

2004 to 2008, he is a Member of the Legislative Assembly from 1989. Perusal of the averments made in the complaint would prima facie indicate that the allegations regarding amassing of assets disproportionate to his known sources of income attracting the offence referred to in Clause (e) to sub-section (1) of Section 13 punishable u/s 13(2) of P.C. Act relates to the whole period from 1989 upto the date of the complaint.

33. In the case of P.V. Narsimha Rao Vs. State (CBI/SPE), the Apex Court has held that the Members of Parliament and State Legislative Assemblies are public servants within the meaning of Section 2(c) (viii) of P.C. Act, 1988.

34. When a specific averment has been made with regard to the issue of sanction in the complaint itself and in the light of the decision of this Court in B.V. Acharya's case (supra), it was obligatory on the part of the learned Special Judge to have considered this aspect even at the stage of entertaining the complaint and referring the same to the police for investigation.

35. The decision in B.V. Acharya's case is binding on the learned Special Judge. In the light of the same, the learned Special Judge ought to have considered this question. Non-consideration of this question has vitiated the order of reference to the police for investigation. This shows non-application of mind by the learned Special Judge and this has rendered the order impugned in this petition illegal, therefore, it cannot be sustained. In this view of the matter, the order impugned in this petition is required to be set aside and the learned Special Judge is required to be directed to consider the matter afresh in the light of the law laid-down in various decisions and the observations made during the course of this order. In the result, the petition is allowed. The impugned order dated 28.11.2012 passed by the learned Special Judge under the P.C. Act, in PCR No. 44/2012 referring the complaint lodged by Respondent No. 2 to the Superintendent of Police, Karnataka Lokayuktha, Bangalore Urban District, in exercise of power u/s 156(3) of Cr.P.C. for investigation and all further proceeding thereon undertaken by Lokayuktha Police are hereby quashed. The learned Special Judge is directed to consider the matter afresh in the light of the law laid-down in the decisions referred to supra and also in the light of the observations made in the course of this order and pass appropriate orders in accordance with law.