IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18TH DAY OF MAY, 2023

BEFORE

THE HON'BLE MR. JUSTICE K.NATARAJAN

WRIT PETITION NO.15139 OF 2021

BETWEEN

SHRI.ABHAY KUMAR
S/O BHARMGOUDA PATIL
AGE: 49 YEARS,
OCC: AGRICULTURE and SOCIAL WORK,
R/AT: MALINI,
HOUSE NO.25,
HOUSUR BASVAN GALLI,
BELAGAVI. ... PETITIONER

(BY SRI C.H. JADHAV, SR.ADVOCATE
FOR SRI. CHANDRASHEKARA K)

AND

THE SUPERINTENDENT OF POLICE
ANTI CORRUPTION BUREAU,
NORTH DIVISION,
SADASHIV NAGAR,
BELAGAVI.
... RESPONDENT

(BY SRI B.B.PATIL, SPECIAL COUNSEL FOR R1
SRI. NITIN BOLABANDI FOR R2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF THE CODE OF CRIMINAL PROCEDURE, PRAYING TO QUASH THE ORDER DATED 21.09.2017 IN PCR NO.18/2012 PASSED BY THE 4TH ADDITIONAL DISTRICT AND SESSIONS JUDGE, BELAGAVI AND CONSEQUENTLY FIR NO.12/2017 DATED 27.09.2017 BY ACB, BELAGAVI CIRCLE POLICE STATION, BELAGAVI AND ETC.,

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 13.4.2023 THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

This writ petition filed by the petitioner/accused under article 226 and 227 of Constitution of India read with 482 of Cr.P.C for quashing the order dated 21.09.2017 in PCR no.18/2012 passed by the 4th Additional District and Sessions judge, Belagavi herein referred as trial court and consequently to quash the FIR Crime No.12/2017 registered by the Lokayuktha police, Belagavi, as being illegal and void.

2. Heard the arguments of learned senior counsel for the petitioner and Sri.B.B.Patil for the Lokayuktha and counsel for the defacto/complainant.

3. The case of the petitioner is that the respondent No.2 the defacto complainant had filed a private complaint before the trial court in PCR No.18/2012 for the offence punishable under Sections

13 (1) (e) read with 13(2) of Prevention of Corruption Act (PC Act), inturn the learned Special Judge referred the complaint to the Lokayuktha police for investigation under Section 156 (3) of Cr.P.C. It is alleged that the petitioner being a sitting MLA during the parade 2004 to 2008 representing the Bagevadi Assembly constituency in Belagavi district and during that time he has amassed the wealth more than the known sources of income, thereby the petitioner being public servant committed the offence under the provisions of PC Act. After receipt of the private complaint, the complaint has been referred to the police, inturn the Lokayuktha police, Belagavi, registered the FIR in Crime No.14/2012.

4. It is the further case of the petitioner that being aggrieved by referring the complaint and registering the FIR the petitioner approached the High Court in writ petition No.75545/2013 wherein the coordinate bench has allowed the writ petition and quashed the FIR and remitted the matter back to the

Special Judge for fresh consideration. Subsequently, once again the trial court referred the same private complaint to the Lokayuktha, police, Belagavi in 2017 where, at that time there was Anti Corruption Bureau (ACB) was in existence and inturn FIR has been registered in Crime No.7/2017 for the offence punishable under Section 13 (1)(3) of PC Act. Once again the petitioner approached the High Court by filing the writ petition No.104165/2017. Once again the coordinate bench of this Court set aside the order of referring the complaint and registering the FIR vide order dated 08.08.2017. Subsequently, once again the private complaint has been referred to the police under Section 156 (3) of Cr.P.C and inturn an FIR No.12/2017 has been registered by the then ACB and the learned Sessions Judge directed the Lokayuktha police to handover the investigation to the ACB and once again now the ACB has been scrapped by the High Court and investigation is pending with the Lokayuktha police which is under challenge.

5. The learned senior counsel for the petitioner has contended that the private complaint and referred the complaint to the police under Section 156 (3) of Cr.P.C and registering the FIR is illegal as the petitioner was MLA, a prior sanction is required while directing the police to investigate the matter in view of the judgment of the Hon'ble Supreme Court in ***Anil Kumar and others Vs M.K. Ayyappa's case***, the complainant not obtained any previous sanction under Section 19 of PC Act for registering the FIR and investigating the matter. Even after quashing the FIR once again the learned special judge referred the complaint, inturn FIR has been registered by the ACB Police which was quashed by the High Court and while quashing the FIR second time, the High Court has held there is no affidavit filed by the complainant as required as per the guidelines issued by the ***Priyanka Srivastava and Another vs. State of U.P. and others*** reported in ***(2015) 6 SCC 287*** and there is no compliance under Section 154 (1)(3) of

Cr.P.C. Therefore, the very private complaint is not sustainable under the law. The learned Sessions Judge, not applied his mind while referring the complaint for registering the FIR. Inspite of quashing FIR twice, once again the Special Court referred the complaint without the previous sanction and non compliance of ***Priyanka Srivastava's*** case. Therefore, continuing the investigation based upon the private complaint is abuse of process of law, therefore prayed for quashing the FIR and the private complaint. In support of his argument learned senior counsel has relied upon various judgment of Hon'ble Supreme Court and judgment of the coordinate benches of this court.

6. Per contra, learned counsel appearing for the Lokayuktha has filed statement of objections and contended that the petition is not maintainable. The complainant after conducting the preliminary enquiry registered the FIR as per the decision of the Hon'ble Supreme Court in ***Lalitha Kumari's case***. The

petitioner was a public servant during the period of his tenure, he was in possession of the properties disproportionate to his known source of income, therefore, he has committed the offence. As per the direction of the High Court a fresh reference has been made for investigation in 2017. Previously, the petitioner was filed before the Dharwad bench of the High Court, later it was transferred to the Principal Bench. The complainant filed the affidavit in support of the private complaint, the affidavit filed by the petitioner earlier while conducting election and subsequent to the 2008, there was huge assets amassed by him. Therefore, matter is required for investigation, hence, prayed for dismissing the petition.

7. The learned counsel for respondent No.2 also objected the petition by filing the statement of objections and contended that, the petitioner while being in office as MLA has abused his office and used his political clout and amassed huge wealth in the form of

movable and immovable properties during 2004 to 2013. The averments made in the petition are denied and contended that the trial court has passed the order with proper application of mind and referred to the investigation and while referring the matter the petitioner was not a sitting MLA, therefore, it is not required to obtain any sanction. Hence, prayed for dismissing the petition. In support of his argument, he has relied upon the judgment of the Hon'ble Supreme Court.

8. Having heard the arguments of learned counsel for respective parties and perused the records, it is an admitted fact, the petitioner was an MLA during the period of 2004 to 2008 and also 2008 to 2013 and later from 2018 till April 2023.

9. It is also an admitted fact, the de-facto complainant previously filed a private complaint which was numbered as PCR No.18/2012 before the special judge at Belagavi and it is alleged that the petitioner

was in possession of property more than his known source of income. The complaint has been referred to the Lokayuktha police, Belagavi in turn the Lokayuktha police registered an FIR in Crime No.14/2012 and the petitioner approached the High Court by filing Writ Petition No.75545/2013 which came to be allowed on 06.01.2016. The FIR has been quashed by the coordinate bench of this court and remitted the matter back to the sessions judge for considering the mandatory requirements of law.

10. It is also an admitted fact, once again after the remand, the learned Sessions judge, referred the matter to the Lokayuktha police and an FIR in Crime No.7/2017 has been registered and once again the petitioner approached the High court by filing the Writ Petition No.104165/2017, the coordinate bench of this court once again set aside the order of reference passed by the trial court on 20.4.2017 by judgment of the coordinate bench of this court dated 08.08.2017.

11. It is also an admitted fact, the coordinate bench of this court has set aside the first FIR on the ground there is no application of mind while referring the complaint to the police and in the order passed by the coordinate bench while quashing the second FIR on 8.8.2017 where it has held there is no affidavit filed by the complainant as required, as per the guidelines of the Hon'ble Supreme Court in ***Priyanka Srivastava's*** case reported in 2015 (6) SCC 287. Subsequently, after the quashing the second FIR, once again the complainant has filed affidavit before the Special judge and in turn the Special Judge once again referred the complaint to the then ACB for the investigation and inturn the ACB registered the FIR in Crime No.12/2017 which is under challenge.

12. On perusal of the order passed by the coordinate bench of this court in Writ Petition.No.104165/2017 dated 08.08.2017 while quashing the FIR in Crime 7/2017 on the ground there is

no compliance of guidelines of ***Priyanka Srivastava's*** case for not filing the affidavit for compliance of section 154 (1) and 154 (3) of Cr.P.C. It is well settled by Hon'ble Supreme Court in the ***Priyanka Srivastava's*** case, by the Hon'ble Supreme Court as under:

> ***"29.*** *At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same.*
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> ***30****. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the*

allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. *We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we*

> *have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."*

13. In view of the judgment of the Hon'ble Supreme Court in ***Priyanka Srivastava's*** case stated supra, the complainant cannot directly file the private complaint under Section 200 Cr.P.C for the purpose of referring the complaint to the police under Section 156 (3) of Cr.p.C without the compliance or without approaching the police by the complainant under Section 154 (1) of Cr.P.C and subsequently he shall approach the higher officer of the police under Section 154 (3) of Cr.P.C and after exhausting the remedies before both

the provisions then only the complainant shall approach the Magistrate under Section 200 of Cr.P.C for the purpose of reference under Section 156 (3) of Cr.P.C. The coordinate bench of this court has categorically held while allowing the writ petition filed by the petitioner in W.P.No.104165/2017 dated 8.8.2017. By looking to the case records, there is no documents filed by the complainant/respondent No.2 along with the affidavit in order to show there was compliance of ***Priyanka Srivastava's*** case in order to refer the complaint and to register the FIR and to investigate the matter as against the petitioner. Therefore, on this ground the very private complaint and referring the complaint to the police under Section 156 (3) and registering the FIR in Crime No.12/2017 by the then ACB Police is not sustainable under the law and therefore continuing the investigation is nothing but an abuse of process of law and is liable to be quashed.

14. The another contention taken by learned senior counsel for petitioner is that the petitioner being public servant and offence alleged against him is punishable under the PC Act, therefore a prior sanction under Section 19 of PC Act is required and even under 197 of Cr.P.C a protection is available for the petitioner and without a sanction the FIR and investigation cannot be continued and even for filing the complaint, the sanction order shall be accompanied and therefore it is contended without prior sanction the special judge has no authority to refer the matter to police for investigation and also it is contended when a private complaint has been filed, the complainant shall produce the sanction order even for taking cognizance and making enquiry under Section 202 of Cr.P.C without referring complaint to the police. Therefore, it is contended the very complaint is not sustainable under the law. In support of his case, he has relied upon the judgment of Hon'ble Supreme Court in ***M.K. Ayyappa's case*** and other cases.

15. Admittedly, the complainant not produced any sanction order while filing the complaint either to take cognizance by the learned session judge himself and for posting the matter for recording the sworn statement under Section 202 of Cr.P.C and even for referring the complaint to the police, the prior sanction under Section 19 of PC Act is required.

16. In the case of Anil Kumar Vs MK Ayyappa reported in (2013) 10 SCC 705 has held as under:-

> ***11.*** *The scope of Section 156(3) Cr.P.C came up for consideration before this Court in several cases. This Court in Maksud Saiyed case [(2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order.*

The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.

12. *We will now examine whether the order directing investigation under Section 156(3) CrPC would amount to taking cognizance of the offence, since a contention was raised that the expression "cognizance" appearing in Section 19(1) of the PC Act will have to be construed as post-cognizance stage, not pre-cognizance stage and, therefore, the requirement of sanction does not arise prior to taking cognizance of the offences punishable under the provisions of the PC Act.*

13. *The expression "cognizance" which appears in Section 197 CrPC came up for consideration*

before a three-Judge Bench of this Court in State of U.P. v. Paras Nath Singh [(2009) 6 SCC 372 : (2009) 2 SCC (L&S) 200] , and this Court expressed the following view: (SCC pp. 375, para 6)

"6. … '10. … And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words 'no' and 'shall' makes it abundantly clear that the bar on the exercise of power of the

*court to take cognizance of any offence is absolute and complete. 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.' [**Ed.**: As observed in State of H.P. v. M.P. Gupta, (2004) 2 SCC 349, 358, para 10 : 2004 SCC (Cri) 539.]*
"

***17.** We may now examine whether, in the abovementioned legal situation, the requirement of sanction is a precondition for ordering investigation under Section 156(3) CrPC, even at a pre-cognizance stage.*

This extract is taken from Anil Kumar v. M.K. Aiyappa, (2013) 10 SCC 705 : (2014) 1 SCC (Cri) 35 : 2013 SCC OnLine SC 904 at page 713

18. *Section 2(c) of the PC Act deals with the definition of the expression "public servant" and provides under clauses (viii) and (xii) as under:*

"***2. (c)(viii)*** *any person who holds an office by virtue of which he is authorised or required to perform any public duty;*

***

(xii) *any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority."*

19. *The relevant provision for sanction is given in Section 19(1) of the PC Act, which reads as under:*

"***19. Previous sanction necessary for prosecution****.—(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction—*

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office."

21. *The learned Senior Counsel appearing for the appellants raised the contention that the requirement of sanction is only procedural in nature and hence, directory or else Section 19(3) would be rendered otiose. We find it difficult to accept that contention. Sub-section (3) of Section 19 has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to*

obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) CrPC. The above legal position, as already indicated, has been clearly spelt out in Paras Nath Singh and Subramanian Swamy cases.

22. *Further, this Court in Army Headquarters v. CBI opined as follows: (SCC p. 261, paras 82-83)*

"82. Thus, in view of the above, the law on the issue of sanction can be summarised to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. …

83. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise

the issue of jurisdiction as the entire action may be rendered void ab initio….""

17. Though the learned counsel for the respondent relied upon the judgment of ***L.Narayana Swamy Vs State of Karnataka reported in (2016) 9 SCC 598*** and contended the petitioner was not an MLA while referring the complaint to the police and investigating the matter. But the complaint has been filed in the year 2012 itself and there was reference to the police for investigating the matter and during that time he was sitting MLA and while referring the matter third time he may not be MLA but in view of the judgment of the Hon'ble Supreme court in ***Priyanka Srivastava's*** case without approaching the police under Section 154 of Cr.P.C and directly filing the private complaint and got it referred to the police is not sustainable. The learned counsel for respondent No.1 also relied upon the judgment of Hon'ble Supreme Court ***in CBI and Anr. Vs Thommandru Hannah Vijayalakshmi @ T.H. Vijayalakshmi and Anr.,***

reported in 2021 SCC online SC 923, where the Hon'ble Supreme Court has held in disproportionate asset case, the court cannot act as auditor for calculating the assets and liabilities of the accused persons. There is no second thought in respect of principle laid down by the Hon'bie Supreme Court but it has to be considered while considering the matter on merits. But here in this case, the very complaint filed by the respondent No.2 under Section 200 of Cr.P.C and referring the complaint to the police under Section 156(3) of Cr.P.C is not sustainable for non-compliance of guidelines issued by the ***Priyanka Srivastava's*** case and non-compliance under Section 154 of Cr.P.C. The co-ordinate bench of this Court quashed the FIR twice inspite of the same, one more FIR has been registered by the police and without sanction under Section 19 of PC Act and a protection available under Section 197 of Cr.P.C, the private complaint not accompanied with the sanction as per the judgment of Hon'ble Supreme Court in ***M.K. Ayyappa's case*** , the FIR as well as the private

complaint not sustainable under the law. Therefore, continuing the investigation and very filing of the private complaint without source reports from the police and the investigation is void and continuing investigation is nothing but abuse of process of law and liable to be set aside.

Accordingly, this writ petition is ***allowed***.

The PCR No.18/2012 filed by the respondent No.2 and referring the case under Section 156 (3) of Cr.P.C to the ACB Police/Lokayuktha police, Belagavi registered in Crime No.12/2017, is hereby quashed.

Sd/-
JUDGE

AKV