

A.F.R.

Reserved

Case :- CRIMINAL MISC. WRIT PETITION No.8079 of 2022

Petitioner :- Vinay Pathak

Respondent :- State Of U.P. Thru. Addl. Chief Secy. / Prin. Secy.
Home Lko And Others

Counsel for Petitioner :- Lalita Prasad Misra, Nadeem
Murtaza, Shubham Tripathi

Counsel for Respondent :- G.A.

Hon'ble Rajesh Singh Chauhan, J.

Hon'ble Vivek Kumar Singh, J.

1. Heard Dr. L.P. Misra, assisted by Sri Nadeem Murtaza, learned counsel for the petitioner, Sri Jaideep Narain Mathur, learned Senior Advocate, assisted by Sri S.N. Tilhari, learned counsel for the State and Sri I.B. Singh, learned Senior Advocate, assisted by Ms. Ashmita Singh, learned counsel for the complainant/opposite party no.5.

2. By means of this petition, the petitioner has prayed following main reliefs:-

“(i) to issue a writ, order, or direction in the nature of Certiorari quashing the impugned first information report, registered against the Petitioner by Respondent no. 5, as FIR/ Case Crime No.0310/2022, under section 342, 386, 504 and 506 IPC, and 7 of Prevention of Corruption Act, 1988 at Police Station- Indira Nagar, District- Lucknow on 29.10.2022, contained in Annexure no. 1 to the writ petition;

(ii) to issue a writ, order, or direction in the nature of Mandamus, commanding the Respondents not to proceed, prosecute, or arrest the Petitioner on the basis of the impugned FIR registered against the Petitioner by Respondent no.5 as FIR/ Case Crime No.0310/2022, under section 342, 386, 504 and 506 IPC, and 7 of Prevention of Corruption Act, 1988 at Police Station- Indira Nagar, District- Lucknow on 29.10.2022, contained in Annexure no.1 to the writ petition; in the alternative at least without complying with the mandatory statutory provision as contained under Section 17-A of the Prevention of Corruption Act or till the submission of charge-sheet, whichever is later”

3. The main contention to assail the impugned FIR are two fold. Firstly, no specific allegation against the present petitioner has been levelled to constitute, *prima facie*, offence under Section 386 IPC. Even otherwise, no offence as alleged in the FIR is, *prima facie*, made out against the petitioner. If the allegation regarding extortion of money is taken on its face value, as per the allegation of the FIR, in that case too, at the best offence under Section 384 IPC may be attracted, however, the petitioner is denying the aforesaid allegation, but in that case, the punishment under those sections would be below seven years and the investigation may be conducted as per the directions and guidelines of the Apex Court in re; **Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273**, by giving prior notice under Section 41-A Cr.P.C. Secondly, no FIR against the present petitioner can be lodged in view of the bar of Section 17-A of the Prevention of Corruption Act, 1988 (hereinafter referred to as “P.C. Act”).

4. Dr. Misra has further submitted that since the FIR has been lodged under Section 7 of P.C. Act besides other sections of IPC, therefore, compliance of Section 17-A of P.C. Act would be mandatory. Sections 7 & 17-A of P.C. Act are being reproduced herein below:-

“[7. Offence relating to public servant being bribed.-- Any public servant who,--

(a) obtains or accepts or attempts to obtain from any person, an undue advantage, with the intention to perform or cause performance of public duty improperly or dishonestly or to forbear or cause forbearance to perform such duty either by himself or by another public servant; or

(b) obtains or accepts or attempts to obtain, an undue advantage from any person as a reward for the improper or dishonest performance of a public duty or for forbearing to perform such duty either by himself or another public servant; or

(c) performs or induces another public servant to perform improperly or dishonestly a public duty or to forbear performance of such duty in anticipation of or in consequence of accepting an undue advantage from

any person,

shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

[17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.-- No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval--

(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;

(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

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

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

5. Dr. Misra has submitted that compliance of Section 17-A of P.C. Act is mandatory. In support of his aforesaid submission, he has placed reliance upon the decision of the Apex Court in re; **Yashwant Sinha and Others v. Central Bureau of Investigation through its Director and Another, (2020) 2 SCC 338**, referring paras 117, 118 & 119, which are as under:-

“117. In terms of Section 17-A, no police officer is permitted to conduct any enquiry or inquiry or conduct investigation into any offence done by a public servant where the offence alleged is relatable to any recommendation made or decision taken by the public servant in discharge of his public functions without previous approval, inter alia, of the authority competent to remove the public servant from his office at the time when the offence was alleged to have been committed. In respect of the public servant, who is involved in this case, it is clause (c), which is applicable. Unless, therefore, there is previous approval, there could be neither inquiry or enquiry or investigation. It is in this context apposite to notice that the complaint, which has been filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018, moved before the first respondent CBI, is done after Section 17-A was inserted. The complaint is dated 4-10-2018. Para 5 sets out the relief which is sought in the complaint which is to register an FIR under various provisions. Paras 6 and 7 of the complaint are relevant in the context of Section 17-A, which read as follows:

“6. We are also aware that recently, Section 17-A of the Act has been brought in by way of an amendment to introduce the requirement of prior permission of the Government for investigation or inquiry under the Prevention of Corruption Act.

7. We are also aware that this will place you in the peculiar situation, of having to ask the accused himself, for permission to investigate a case against him. We realise that your hands are tied in this matter, but we request you to at least take the first step, of seeking permission of the Government under Section 17-A of the Prevention of Corruption Act for investigating this offence and under which, “the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month”.”

(emphasis supplied)

118. Therefore, the petitioners have filed the complaint fully knowing that Section 17-A constituted a bar to any inquiry or enquiry or investigation unless there was previous approval. In fact, a request is made to at least take the first step of seeking permission under Section 17-A of the 2018 Act. Writ Petition (Criminal) No. 298 of 2018 was filed on 24-10-2018 and the complaint is based on non-registration of the

FIR. There is no challenge to Section 17-A. Under the law, as it stood, both on the date of filing the petition and even as of today, Section 17-A continues to be on the statute book and it constitutes a bar to any inquiry or enquiry or investigation. The petitioners themselves, in the complaint, request to seek approval in terms of Section 17-A but when it comes to the relief sought in the writ petition, there was no relief claimed in this behalf.

119. Even proceeding on the basis that on petitioners' complaint, an FIR must be registered as it purports to disclose cognizable offences and the Court must so direct, will it not be a futile exercise having regard to Section 17-A. I am, therefore, of the view that though otherwise the petitioners in Writ Petition (Criminal) No. 298 of 2018 may have made out a case, having regard to the law actually laid down in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , and more importantly, Section 17-A of the Prevention of Corruption Act, in a review petition, the petitioners cannot succeed. However, it is my view that the judgment sought to be reviewed, would not stand in the way of the first respondent in Writ Petition (Criminal) No. 298 of 2018 from taking action on Ext. P-1, complaint in accordance with law and subject to first respondent obtaining previous approval under Section 17-A of the Prevention of Corruption Act.”

6. Dr. Misra has further submitted that unless and until the previous approval from competent authority is received to make investigation against the present petitioner in view of Section 17-A of P.C. Act, the police authorities may be restrained to conduct investigation against the petitioner pursuant to the impugned FIR and the operation and implementation of the impugned FIR may be stayed so far as the present petitioner is concerned.

7. Dr. L.P. Misra has also submitted that for the alleged incident of the month of February, 2022, thereafter of the month of April, 2022, the FIR has been lodged on 29.10.2022. In the said FIR, no specific date of incident has been indicated for the allegation relating to the month of February, 2022. Further, the allegations so levelled in the FIR are highly improbable inasmuch as when the complainant was

allegedly instructed to deposit a sum of Rs.63 lakh in one International Business Firm account at Alwar, Rajasthan, as to why he had deposited a sum of more than Rs.74 lakh approx.

8. Dr. Misra has also vehemently submitted that during investigation the investigating agency has added Sections 409, 420, 467, 468, 471 & 120-B of IPC, besides earlier Sections 342, 386, 504, 506 IPC and Section 7 of the P.C. Act to subvert the procedure established by the law, however, ingredients of all aforesaid sections do not attract in the present F.I.R, therefore, the impugned F.I.R. may be quashed both on merits as well as the same is violative of Section 17-A of the P.C. Act.

9. Sri I.B. Singh, learned Senior Advocate, appearing for opposite party no.5 has raised an objection regarding maintainability and scope of the writ petition under Article 226 of the Constitution of India referring the decision of the Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Others, AIR 2021 Supreme Court 1918**. Sri I.B. has referred paras 7.3, 15 & 16 of the aforesaid judgement, which are being reproduced herein-below:-

“7.3. Then comes the celebrated decision of this Court in the case of State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335. In the said decision, this Court considered in detail the scope of the High Court powers under Section 482 Cr.P.C. and/or Article 226 of the Constitution of India to quash the FIR and referred to several judicial precedents and held that the High Court should not embark upon an inquiry into the merits and demerits of the allegations and quash the proceedings without allowing the investigating agency to complete its task. At the same time, this Court identified the following cases in which FIR/complaint can be quashed:

“102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) *Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

(3) *Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*

(4) *Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*

(5) *Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*

(6) *Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.*

(7) *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”*

“15. As observed hereinabove, there may be some cases where the initiation of criminal proceedings may be an abuse of process of law. In such cases, and only in exceptional cases and where it is found that non interference would result into miscarriage of justice, the High Court, in exercise of its inherent powers under Section 482 Cr.P.C. and/or Article 226 of the Constitution of India, may quash the FIR/complaint/criminal proceedings and even may stay the further investigation. However, the High Court should be slow in interfering the criminal proceedings at the initial stage, i.e., quashing petition filed immediately after lodging the FIR/complaint and no sufficient time is given to the police to investigate

into the allegations of the FIR/complaint, which is the statutory right/duty of the police under the provisions of the Code of Criminal Procedure....

16. ...

... Therefore, in case, the accused named in the FIR/complaint apprehends his arrest, he has a remedy to apply for anticipatory bail under Section 438 Cr.P.C. and on the conditions of grant of anticipatory bail under Section 438 Cr.P.C being satisfied, he may be released on anticipatory bail by the competent court. Therefore, it cannot be said that the accused is remediless. It cannot be disputed that the anticipatory bail under Section 438 Cr.P.C. can be granted on the conditions prescribed under Section 438 Cr.P.C. are satisfied. At the same time, it is to be noted that arrest is not a must whenever an FIR of a cognizable offence is lodged. Still in case a person is apprehending his arrest in connection with an FIR disclosing cognizable offence, as observed hereinabove, he has a remedy to apply for anticipatory bail under Section 438 Cr.P.C. As observed by this Court in the case of Hema Mishra v. State of Uttar Pradesh, (2014) 4 SCC 453, though the High Courts have very wide powers under Article 226, the powers under Article 226 of the Constitution of India are to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by the authorities indiscriminately making pre-arrest of the accused persons. It is further observed that in entertaining such a petition under Article 226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Article 226 is not to be exercised liberally so as to convert it into Section 438 Cr.P.C. proceedings. It is further observed that on the other hand whenever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its powers under Article 226 of the Constitution of India, keeping in mind that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified. However, such a blanket interim order of not to arrest or “no coercive steps” cannot be passed mechanically and in a routine manner.”

- 10.** On the basis of aforesaid observation of the Hon’ble Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd.** (supra), Sri I.B.

Singh has submitted that the allegations so levelled against the petitioner in the FIR disclose commission of cognizable offence, therefore, the FIR in question may not be quashed. Since the FIR may not be quashed, therefore, no interim protection can be granted to the petitioner. Further, there is a statutory prescription under Section 438 Cr.P.C. to file anticipatory bail application, therefore, extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India may not be invoked.

11. Replying the aforesaid contention of Sri I.B. Singh, learned Senior Advocate, Dr. Misra has submitted that since the impugned FIR is illegal as the same could have not been lodged in view of the specific bar of Section 17-A of the P.C. Act, therefore, the impugned FIR is liable to be quashed. Hence, the dictum of Hon'ble Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd.** (supra) would not be applicable in the present case.

12. On that, Sri I.B. Singh has placed reliance upon the decision of Kerala High Court in re; **Shankara Bhat and Ors. Vs. State of Kerala and Ors.**, reported in **MANU/KE/2227/2021**, whereby applicability of Section 17-A of P.C. Act has been examined and the Kerala High Court in paras 13, 25 & 26 of the said judgment has observed as under:-

“13. In the back ground of the law laid down in that context, the contention, whether prior approval as contemplated under section 17A introduced by 2018 Amendment to the Prevention of Corruption Act is required in respect of every act which form subject matter of prosecution has to be considered. In this context, it is essential to refer to the exact words Crl.M.C Nos.7542/2018 & others 17 employed by the statute which reads as follows;

“S. 17A No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official

functions or duties without previous approval.”.

Under section 17A, which was inserted by Act 16 of 2018, and which came into force with effect from 26/7/2018, the previous approval by the concerned authorities is essential. The crucial question that arises for consideration in these proceedings is whether previous approval from the competent authority need to be obtained for every enquiry, inquiry or investigation, into every offence committed by the public servant. The crux of the issue is whether the above provision is an omnibus, all pervasive pre requisite for every enquiry or inquiry or investigation into every act done by the public servant in discharge of his official functions.

“25. The reasonable conclusion that can be arrived at regarding the scope of section 17A is that prior approval under section 17A for conducting any enquiry, inquiry or investigation is required only when the offence alleged is relatable to a decision taken or recommendation made by the public authority and it involves a debatable or suspicious or doubtful recommendation made or decision taken by the authority. Acts, which are ex facie criminal or constitute an offence do not require approval under section 17A of P.C.Act. This legal proposition, seems to be clear from the statute and is in consonance with the spirit of the Prevention of Corruption Act and also in consonance with the legal principles laid down in relation to section 197 Cr.P.C.

26. Applying the above legal principles, I am of the firm opinion that in the cases at hand, which involve allegation of falsification of accounts, breach of trust and misappropriation of funds or acts which are ex facie criminal, no prior approval under section 17A of Prevention of Corruption Act is required. Hence, all the Crl.M.Cs. are without any merit and are liable to be dismissed. However, it is made clear that except this issue, all other issues touching on the merit, are left open to be raised and considered at the appropriate stage. In the result, all the Crl.M.Cs stand dismissed.”

13. The aforesaid judgment has been challenged before the Apex Court by filing Petition(s) for Special Leave to appeal (Crl.) No(s).9341/2021, Manoj. K.M vs. State of Kerala & Anr. and the said

Special Leave to Appeal was dismissed by the Apex Court vide order dated 10.12.2021 by the following order:-

“Learned counsel for the petitioner states that Section 13(1) of the Prevention of Corruption Act, 1988 was substituted vide Act 16 of 2018 with effect from 26.7.2018 and that clause (d) to Section 13(1) was not in the statute when the FIR in the instant case was registered.

The impugned order has primarily examined the purport and the legal effect of Section 17A of the Prevention of Corruption Act, 1988. Keeping in view the factual background of this case, we are not inclined to interfere with the impugned order, but leave it open to the petitioner to raise the aforesaid contentions and issues before the Investigating officer/Court.

Recording the aforesaid, the special leave petition is dismissed.

Pending application(s), if any, shall stand disposed of.”

14. Therefore, on the basis of aforesaid judgment, Sri I.B. Singh has submitted that the argument of Dr. Misra regarding 17-A of the P.C. Act may not be applicable in the present case.

15. Sri Jaideep Narain Mathur, learned Senior Advocate, appearing on behalf of the State-respondents has submitted that bare perusal of the allegations of the FIR clearly reveals that the present petitioner has committed offence under Sections 342, 386, 504 & 506 IPC as well as Section 7 of the P.C. Act. Sri Mathur has also drawn attention of this Court towards para 15 of the counter affidavit of the State wherein it has been categorically indicated that on the basis of evidence collected so far, offence under Sections 409, 420, 467, 468, 471 & 120-B of IPC has been added and at present, investigation is under progress for the offences under Sections 342, 386, 504, 506, 409, 420, 467, 468, 471, 120-B of IPC and Section 7 of the Prevention of Corruption Act.

16. Sri Mathur has further submitted that the instant FIR is consisting three incidents. First incident is relating to the month of February, 2022 when the present petitioner compelled the informant

to provide 15% commission for the payments of work done by his Company, thereby providing the mobile number of the co-accused Ajay Mishra. The informant under compelling circumstances paid 15% commission to the petitioner through co-accused Ajay Mishra. Second incident is relating to the month of April, 2022 when the informant has been forced to pay 15% commission of his remaining payment and he paid such commission through cash and through e-banking in the account of one International Business Firm at Alwar, Rajasthan. Third incident is dated 01.09.2022 when the complainant/informant paid commission to the tune of Rs.15,55,000/- to the petitioner through co-accused Ajay Mishra regarding his another payment for the work done by his Company. The informant has indicated not only the dates of such payments but also indicated the amount which is Rs.1,41,00,000/- in all the aforesaid incidents. Sri Mathur has also submitted that when advance commission was demanded from the informant and he could not pay the same, the work assigned to his Company has been stopped by the petitioner and given to the Company of co-accused Ajay Mishra, as has been clearly indicated in the FIR.

17. Sri Mathur has apprised the Court that looking to the gravity and seriousness of the allegations, the investigation has been handed over to the Special Task Force, U.P. Some senior officers/officials of Special Task Force are present in the Court to assist Sri Mathur so that proper informations could be provided to the Court. On the basis of instructions so received from those officers, Sri Mathur has apprised the Court that during the period which has been referred in the FIR, the petitioner has called the co-accused so many times and co-accused has also called the petitioner couple of times. He has also apprised that the informant/ complainant was having no business relations of any kind whatsoever with the Company in the name of International Business Firm, Alwar, Rajasthan and transaction so made with such Firm by the informant/ complainant on 29.04.2022 was the single transaction whereas co-accused Ajay Mishra is having business

relation with such Firm at Alwar, Rajasthan and there are couple of transactions of co-accused Ajay Mishra with such Firm. On the basis of aforesaid submission, Sri Mathur has submitted that this may not be a case that the informant/complainant is having any business relation with the Company at Alwar, Rajasthan but he deposited a sum of Rs.74 lakh approx, to be more precise Rs.51,62,500/-, Rs.11,80,000/- & Rs.10,98,875/- through RTGS at the behest of the petitioner and co-accused Ajay Mishra. Therefore, as per Sri Mathur, some more sections have been added by the investigating agency against the accused persons.

18. So far as contention of the learned counsel for the petitioner regarding bar to investigate the issue in terms of Section 17-A of P.C. Act is concerned, Sri Mathur has submitted that Section 17-A of P.C. Act clearly mandates that said bar would be applicable only where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties. In the present case, extorting money taking undue advantage of his position from the informant may not be considered the act which has been done in discharge of his official duties or function. He has further submitted that since the petitioner is presently serving on the post of Vice Chancellor and has committed offence taking undue advantage of his position, therefore, FIR under Section 7 of P.C. Act besides other sections of IPC has been lodged but the alleged offence is not relatable to any recommendation made or decision taken by the petitioner in discharge of his official function or duties, therefore, bar of Section 17-A of P.C. Act would not be applicable in the present case. Even otherwise this aspect may be looked into at the time of taking cognizance of the offence under Section 19 of the P.C. Act.

19. Sri Mathur has, therefore, submitted that for getting benefit of Section 17-A of the P.C. Act in the light of the dictum of Apex Court in re; **Yashwant Sinha** (supra), the offence in question must be relatable to any recommendation made or decision taken by the petitioner in discharge of his official functions or duties but alleged

offence of the petitioner committing forgery, fraud, criminal breach of trust, forgery of a valuable security etc., extorting money and criminal intimidation etc. having criminal conspiracy with other accused person misusing the position as Vice Chancellor may not come within the four corners of Section 17-A of the P.C. Act, so he is not entitled to get benefit of the judgment of the Apex Court in re; **Yashwant Sinha** (supra).

20. Sri Mathur has also placed reliance upon the dictum of the Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd.** (supra) referring those paragraphs, which have been cited by Sri I.B. Singh, learned Senior Advocate, appearing on behalf of the complainant/opposite party no.5.

21. So as to demonstrate the test as to whether the act was done in discharge of official duty, Sri Mathur has placed reliance upon the dictum of Privy Council in re; **H.H.B. Gill and another v. The King, AIR (35) 1948 Privy Council 128**, referring relevant portion of para-30 thereof, which reads as under:-

“ [30] ... A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purport to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: not does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office...”

22. Sri Mathur has submitted that the aforesaid observation of Privy Council has been followed by the Apex Court time and again in various judgments.

23. Sri Mathur has placed reliance of paras 149 & 152 of Full Bench judgment of this Court in re; **Smt. Neera Yadav vs. C.B.I. (Bharat Sangh), [(2006) 1 UPLBEC 601]**, which read as under:-

“149. In the present case, three charge-sheets contain offence under Sections 13(1)(d) and (2) of Act of 1988 read with Section 120-B, IPC and one charge sheet is only under Section 13 (1)(d) & (2) of the Act of 1988. The offences under Act of 1988 as has been held by the Hon'ble Apex Court in Harihar Prasad (Supra), Kalicharan Mahapatra (Supra), which still holds field, does not come within the purview of word "in discharge of the official duty". Thus, the offence of criminal conspiracy under Section 120-B, IPC, would also not be within the term "in discharge of official duty" and, therefore, Section 197 Cr.P.C. has no application at all.

152. In view of the aforesaid, answers to the aforesaid three questions are as follows:

(I) For prosecution under Prevention of Corruption Act, 1988, once sanction under Section 19 of the said Act is granted, there is no necessity for obtaining further sanction under Section 197 of the Code of Criminal Procedure.

(II) Where a public servant is sought to be prosecuted under the provisions of Prevention of Corruption Act read with Section 120B, I.P.C., and sanction under Section 19 of Act of 1988 has been granted, it is not at all required to obtain sanction under Section 197 Cr.P.C. from the State Government or any other authority merely because the public servant is also charged under Section 120B, I.P.C.

(III) The offences under the Prevention of Corruption Act, 1988 as well as charge of criminal conspiracy, cannot be said to constitute "acts in discharge of official duty."

24. Sri Mathur has submitted that even if the allegation of the petitioner is that he has been falsely implicated so as to tarnish his reputation and allegations so levelled against him in the FIR do not corroborate with the material available on record, then this is a fit case to file anticipatory bail application under Section 438 Cr.P.C. and in such circumstances, where the petitioner has got alternative statutory remedy, the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India may not be invoked. Therefore, as per Sri Mathur, the present petition may be dismissed.

25. Sri Mathur has also submitted that the investigating agency is well aware that the petitioner is a reputed person serving as Vice Chancellor, Chhatrapati Shahuji Maharaj University, Kanpur and has been serving on such position w.e.f. 2009 till date at various Universities, recital to this effect has been given in para-10 of the writ petition, therefore, there may not be any question of his harassment, however, his proper cooperation would be required in the present case as the issue is so serious.

26. On that, Dr. Misra has submitted placing reliance upon paras- 81, 111 & 112 of the judgment in re; **Yashwant Sinha** (supra) that before registration of an FIR, preliminary inquiry is must in the cases involving allegation of corruption by a public servant. Paras- 81, 111 & 112 of the aforesaid case are being reproduced herein-below:-

“81. In this case, the short point, which this Court is called upon to consider, is the effect of the impugned judgment not dealing with a binding decision rendered by a Constitution Bench which was relied upon by the petitioners in Writ Petition (Criminal) No. 298 of 2018 and rendered in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] . It is apposite that I set out what this Court, speaking through the aforesaid Constitution Bench judgment, has laid down in para 120 : (SCC p. 61)

“Conclusion/Directions

120. xxx

120.1. xxx

120.2. xxx

120.3. xxx

120.4. xxx

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each

case. The category of cases in which preliminary inquiry may be made are as under:

- (a) Matrimonial disputes/family disputes*
- (b) Commercial offences*
- (c) Medical negligence cases*
- (d) Corruption cases*
- (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.*

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. xxx

120.8. xxx”

“111. In P. Sirajuddin [P. Sirajuddin v. State of Madras, (1970) 1 SCC 595 : 1970 SCC (Cri) 240], relied upon by the Constitution Bench in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , what this Court has held, and which has apparently been relied upon by the Constitution Bench though not expressly referred to is the following statement contained in para 17 : (P. Sirajuddin case [P. Sirajuddin v. State of Madras, (1970) 1 SCC 595 : 1970 SCC (Cri) 240] , SCC p. 601)

“17. ... Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general.”

(emphasis supplied)

112. In Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , one of the contentions which was pressed before the Court was that in certain situations, preliminary inquiry is necessary. In this regard, attention of the Court was drawn to CBI

Crime Manual. The following paragraphs of Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] may be noticed, which read as follows : (SCC pp. 50-51, paras 89-92)

“89. Besides, the learned Senior Counsel relied on the special procedures prescribed under the CBI Manual to be read into Section 154. It is true that the concept of “preliminary inquiry” is contained in Chapter IX of the Crime Manual of CBI. However, this Crime Manual is not a statute and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure. At this juncture, it is also pertinent to submit that CBI is constituted under a special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derives its power to investigate from this Act.

90. It may be submitted that Sections 4(2) and 5 of the Code permit special procedures to be followed for special Acts. Section 4 of the Code lays down as under:

‘4. Trial of offences under the Indian Penal Code and other laws.—(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.’

It is thus clear that for the offences under the laws other than IPC, different provisions can be laid down under a special Act to regulate the investigation, inquiry, trial, etc. of those offences. Section 4(2) of the Code protects such special provisions.

91. Moreover, Section 5 of the Code lays down as under:

‘5. Saving.—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.’

Thus, special provisions contained in the DSPE Act relating to the powers of CBI are protected also by Section 5 of the Code.

92. In view of the above specific provisions in the Code, the powers of CBI under the DSPE Act, cannot be equated with the powers of the regular State Police under the Code.”

27. While citing paras-107 & 108 of the dictum of the Constitution Bench of the Apex Court in re; **Lalita Kumari v. Government of Uttar Pradesh, (2014) 2 SCC 1**, Dr. Misra has submitted that if registration of FIR is mandatory, arrest of the accused immediately after registration of the FIR is not at all mandatory. Paras-107 & 108 of the aforesaid judgment are as under:-

“107. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for “anticipatory bail” under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.

108. It is also relevant to note that in Joginder Kumar v. State of U.P. [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] , this Court has held that arrest cannot be made by the police in a routine manner. Some important observations are reproduced as under : (SCC pp. 267-68, para 20)

“20. ... No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of

protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

(emphasis supplied)

28. Heard learned counsel for the parties and perused the material available on record.

29. At the very outset, we would like to deal the issue of maintainability of the writ petition in the light of dictum of the Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd.** (supra) as such objection has been raised by Sri I.B. Singh, learned Senior Advocate, appearing on behalf of the complainant/ opposite party no.5 as well as Sri Jaideep Narain Mathur, learned Senior Advocate, appearing on behalf of the State-respondents.

30. In view of para 7.3. (102.1, 102.2 & 102.3) of the aforesaid judgement, it may not be observed, keeping in view the contention of Sri Mathur on the basis of specific instructions so received from the Officers of Investigating Agency, that the allegations of the FIR do not disclose a cognizable offence. Besides, in view of paras- 15 & 16 of the aforesaid judgment, no extreme exception has been carved out by the learned counsel for the petitioner to interfere in the FIR under

Article 226 of the Constitution of India. *Prima facie*, the allegations of the FIR and material and evidences, which are said to have been gathered during investigation as per prosecution, constitute the cognizable offences, therefore, such FIR may not be quashed, hence no interim order can be granted in a petition under Article 226 of the Constitution of India. At the same time, it is also undisputed that provision of Section 438 Cr.P.C. is in existence in the State of U.P., so if the allegation of the learned counsel for the petitioner is considered to the effect that the impugned FIR has been lodged without having any cogent and relevant material with the prosecution to tarnish the reputation of the petitioner, who is discharging the functions of Vice Chancellor of one University and has been Vice Chancellor of various Universities since 2009, the appropriate remedy would be to file an appropriate application for anticipatory bail under Section 438 Cr.P.C. instead of filing writ petition under Article 226 of the Constitution of India inasmuch as the alternative statutory remedy may not ordinarily be circumvented unless there is any exceptional circumstances to interfere in such FIR.

31. Therefore, in view of the above, considering the dictum of the Hon'ble Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd.** (supra), we are not inclined to quash the impugned FIR; so, we cannot pass any interim order in the present case.

32. So far as arguments of Dr. Misra regarding conducting preliminary inquiry prior to lodging the FIR in view of the dictum of the Apex Court in re; **Lalita Kumari** (supra) is concerned, we are of the considered opinion that in para 120.5, the Apex Court has clearly opined that the preliminary inquiry would only be required only to ascertain whether the information reveals any cognizable offence. In the present case, the allegations of the FIR as well as the material/ evidences which are said to have been gathered during investigation, *prima facie*, reveal cognizable offences subject to outcome of the investigation. Further, para-120.6 of the aforesaid judgment indicates category of the cases/ offences in which preliminary inquiry may be

made, wherein clause (d) mentions ‘corruption cases’ but in such para, the Hon’ble Apex Court has observed categorically that *the aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry*. Meaning thereby, the category so described from (a) to (e) in para 120.6 in re; **Lalita Kumari** (supra), as per the Apex Court, are only illustrations and not exhaustive warranting preliminary inquiry as the direction for preliminary inquiry depends upon the facts and circumstances of the issue in question, therefore, if the information received by the prosecution reveals any cognizable offence and that information is, *prima facie*, definite, the preliminary inquiry may not be warranted in such cases. Besides, the case dealt by the Apex Court in re; **Lalita Kumari** (supra) was relating to the C.B.I. investigation and undisputedly the concept of “Preliminary Inquiry” is contained in Chapter IX of the Crime Manual of C.B.I. whereas no such prescription is provided under any Crime Manual of Cr.P.C. or under any manual being dealt by the investigating agency of the present case i.e. Special Task Force. This aspect regarding special proceeding of preliminary inquiry prescribed under C.B.I. Manual has been considered under Para 89 of **Lalita Kumari** (supra).

33. Further, the Full Bench of this Court in re; **Smt. Neera Yadav** (supra) has held in para 152 (III) that the offences under the Prevention of Corruption Act as well as charge of criminal conspiracy, cannot be said to constitute "acts in discharge of official duty."

34. So far as arguments of Dr. Misra regarding the provision of Section 17-A of P.C. Act is concerned, we are of the considered opinion that so as to get the benefit of the P.C. Act, the offence in question must be relatable to any recommendation made or decision taken by a public servant in discharge of his official functions or duties. However, we leave it open for the petitioner to take this plea before the investigating agency or before the competent court of law, as the case may be and such agency or court may take appropriate

decision, as per law, as to whether this aspect should be considered in the light of Section 17-A or 19 of the P.C. Act.

35. The Privy Council in **H.H.B. Gill** (supra) has rightly observed that a Judge neither acts nor purport to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: likewise the act of a Government medical officer in picking the pocket of a patient to whom he is examining may not be said to an act in discharge of his official duties as a public servant though the examination itself may be such an act. Therefore, if the aforesaid test is applied in the present case, the alleged act of the petitioner committing forgery, fraud, criminal breach of trust, criminal intimidation, forgery of valuable security etc., wrongful confinement, extorting money etc. having criminal conspiracy with other accused persons misusing his position as Vice Chancellor may not be said to an act or purported to act in discharge of his official duty as it is not relatable to any recommendation made or decision taken by him in discharge of his official functions or duties though directing for payment of the informant for the work done by his Firm may be such an act. Hence, in view of the above, the present petitioner may not get the benefit of Section 17-A of the P.C. Act in the light of the judgment of the Apex Court in re; **Yashwant Sinha** (supra). The facts and circumstances of the present case are different from the facts and circumstances of the judgment in re; **Yashwant Sinha** (supra). However, we have great respect towards the judgment of the Hon'ble Supreme Court in re; **Yashwant Sinha** (supra), but it is a trite law of the Apex Court that unless and until the facts and circumstances of the case in hand are identically the same with the case of the Apex Court so cited, that would not be applicable.

36. So far as paras 107 & 108 of the case in re; **Lalita Kumari** (supra) are concerned wherein it has been observed by the Apex Court that if registration of FIR is mandatory, arrest of the accused immediately after registration of FIR is not at all mandatory, we are of the considered opinion that the trite law of the Apex Court is binding

upon every concerned as law of the Hon'ble Supreme Court is the law of land. Notably, the petitioner is not having any prior criminal history and keeping in a view the fair stand of the State-respondent that the proper co-operation of the petitioner is very much required in this serious issue, we think it proper to observe that a proper recourse, as per law, should be adopted by the investigating agency.

37. So far as submission of Dr. L.P. Misra regarding added sections during investigation to subvert the procedure established by the law is concerned, we are of the opinion that since those sections are said to have been added after collecting the relevant material/evidences and the investigation is still in progress, therefore, we cannot accept the aforesaid submission of Dr. L.P. Misra. However, we legitimately expect that the Investigating Officer shall conduct and conclude the investigation strictly in accordance with law and also in the light of settled proposition of law of the Apex Court from **Joginder Kumar** (supra), **Lalita Kumari** (supra) till **Satender Kumar Antil vs. CBI and others, Special Leave to Appeal (Criminal) No.5191 of 2021** as it is needless to say that all concerned are duty bound to follow the directions and guidelines of the Apex Court issued from time to time in catena of cases.

38. Before parting with, we make it clear that since we are not entertaining this petition, in the light of the dictum of the Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd.** (supra), for the reason that bare perusal of the allegations of the FIR and the material/evidences which are said to have been collected during investigation, as recital to this effect has been made in the counter affidavit of the State, disclose, *prima facie*, commission of cognizable offences subject to final outcome of the investigation, therefore, our aforesaid observations may not be taken adversely against the present petitioner nor it may be treated as protection to the petitioner in any manner whatsoever. The investigating agency or any competent court below should not be influenced from the aforesaid observations of this judgment. The fair and impartial investigation is a bare minimum

expectation of this Court and it is also expected from all concerned that the settled proposition of law is followed.

39. In view of what has been considered above, we hereby **dismiss** this writ petition.

40. However, it is always open for the petitioner to take appropriate legal recourse by filing his appropriate applications under Section 438 Cr.P.C. or any other application before the competent court of law and if any appropriate application is filed before the learned court below by the petitioner, the same shall be considered and disposed of with expedition, without giving any unnecessary adjournment to any of the parties.

41. No order as to cost.

[Vivek Kumar Singh,J.] [Rajesh Singh Chauhan,J.]

Order Date :- 15.11.2022
RBS/-