



GAHC010123822014

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1989/2014

SUMIT DAS
S/O LT. ABANI KUMAR DAS, R/O H/NO.45, RUPAM APARTMENT,
NAHARONI PATH, LAST GATE, DISPUR, DIST- KAMRUP METRO, ASSAM

VERSUS

THE STATE OF ASSAM AND 5 ORS
REPRESENTED BY THE COMMISSIONER and SECRETARY, DEPARTMENT
OF HOME AFFAIRS, DISPUR, GHY-6

2:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GHY-7

3:THE SUPERINTENDENT OF POLICE
CM'S SPECIAL VIGILANCE CELL
ASSAM
SIXMILE
PANJABARI ROAD
F.A. AHMED NAGAR
GHY-22

4:THE DY. SUPERINTENDENT OF POLICE
CM'S SPECIAL VIGILANCE CELL
ASSAM
SIXMILE
PANJABARI ROAD
F.A. AHMED NAGAR
GHY-22



5:SAILEN KUMAR SARMA
GOVT. REGD. CLASS-1A CONTRACTOR
S/O LT. MANI RAM SARMA
TANGLA
P.O. TANGLA
DIST- UDALGURI
BTAD
PRESENTLY R/O MANIK NAGAR
P.O. and P.S. DISPUR
GHY-6

6:THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM
IRRIGATION DEPARTMENT
DISPUR
GHY-

For the Petitioner(s)	: Mr. N. Haque, Advocate : Mr. A. K. Azad, Advocate : Mr. S. R. Barbhuiya. Advocate
For the Respondent(s)	: Mr. D. Nath, Sr. Govt. Advocate : Mr. N. Upadhyay, Advocate

Linked Case : WP(C)/2707/2014

PHULENDRA NATH PATHAK
S/O LT. AMBIKA CHARAN PATHAK
R/O H/NO.18
NANDAN PATH
RUKMINI NAGAR
P.S. DISPUR
GHY-6
DIST- KAMRUP METRO
ASSAM

VERSUS

THE STATE OF ASSAM AND 5 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM



HOME DEPARTMENT
DISPUR
GHY-6

2:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GHY-7

3:THE SUPERINTENDENT OF POLICE
CHIEF MINISTER'S SPECIAL VIGILANCE CELL
ASSAM
SIXMILE
PANJABARI ROAD
F.A. AHMED NAGAR
GHY-22

4:THE DY. SUPERINTENDENT OF POLICE
C.M.'S SPECIAL VIGILANCE CELL
ASSAM
SIXMILE
PANJABARI ROAD
F.A. AHMED NAGAR
GHY-22

5:SAILEN KUMAR SARMA
CLASS- 1A CONTRACTOR
S/O LT. MANI RAM SARMA
R/O MANIK NAGAR
P.O. and P.S. DISPUR
DIST- KAMRUP METRO
ASSAM
GUWAHATI

6:THE PRINCIPAL SECRETARY
ADDL. CHIEF SECRETARY TO THE GOVT. OF ASSAM
IRRIGATION DEPARTMENT
DISPUR
GHY-6

For the Petitioner(s)

: Mr. N. Haque, Advocate
: Mr. A. K. Azad, Advocate
: Mr. S. R. Barbhuiya. Advocate

For the Respondent(s)

: Mr. D. Nath, Sr. Govt. Advocate
: Mr. N. Upadhyay, Advocate



**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 05-08-2023

1. In both the writ petitions as the facts are similar, the relief so sought for is the same and the questions of law involved being *pari materia*, both the writ petitions are taken up for disposal by this common judgment and order.

2. One Shri Sailen Kumar Sharma, the Respondent No.5 in both the writ petitions had filed a petition under the provisions of Prevention of Corruption Act, 1988 (for short "the Act of 1988") before the Court of the Special Judge, Assam making various allegations against one Shri Anup Kumar Gohain, the then Chief Engineer, Minor Irrigation, Assam and to punish him as per the provisions of the Act of 1988 or the Indian Penal Code. It is relevant to take note of that in the petition so filed, there was no allegations against the Petitioners herein. The Court of Special Judge, Assam registered the said petition as Complain Case No.11/2013 and vide an order dated 20.08.2013 invoked the powers under Section 156(3) of the Code of Criminal Procedure, 1973 (for short "the Code") and forwarded the complain petition to the Superintendent of Police, CM's Special Vigilance Cell, Assam with a direction to register a case under appropriate provisions of the Prevention of Corruption Act, 1988 and to endorse the investigation of the case to a Police Officer not below to the rank of Dy. S.P. and also to submit a report within one month. The Respondent No.5 who was the complainant was directed to appear

personally before the Superintendent of Police, CM's Special Vigilance Cell, Assam within two days from the date of the said order. The Special Judge, Assam further fixed the matter on 20.09.2013 for submission of the report.

3. On the basis of the said order dated 20.08.2013, a Vigilance P.S. Case No.7/2013 was registered on 22.08.2013 under Section 420 of the IPC read with Section 13(1)(c)(d)/15/13(2) of the Act of 1988 and the said complaint filed by the Respondent No.5 was treated as the FIR. Thereupon, investigation was carried out and on 20.09.2013, the Superintendent of Police, CM's Special Vigilance Cell, Assam submitted an investigation report before the Special Judge, Assam. The details of the investigation so carried out was mentioned in the said report and it was further stated that the investigation of the case was proceeding, verification and scrutiny of seized documents is yet to be completed.

4. The Special Judge, Assam vide an order dated 20.09.2013 upon perusal of the report submitted by the Investigating Officer, fixed 07.11.2013 for submission of the Status Report/Final Form. Thereafter, the Investigating Officer completed the investigation and opined in its report that the Petitioner in WP(C) No.1989/2014 as well as the Petitioner in WP(C) No.2707/2014 had prepared false demand (progress report) showing 100% physical progress of the Scheme 13th Finance Commission under Mangaldai Division (Irrigation) and forwarded to the authority for release of the fund with some ulterior motive for which the Petitioners were liable to be prosecuted under Section 13(1)(d)/15 of the Act of 1988 (as it stood prior to the Amendment of 2018). It is further seen from the records that on 29.01.2014, the Superintendent of Police, CM's Special Vigilance Cell, Assam had issued a communication to the Principal

Secretary to the Government of Assam, Irrigation Department seeking sanction for prosecution against the Petitioners in both the writ petitions under Section 13(1)(d)/15 of the Act of 1988 (as it stood prior to the Amendment of 2018). Both the Petitioners being aggrieved by the submission of the report by the Investigating Officer in Vigilance P.S. Case No.7/2013 as well as the request for according sanction by the Superintendent of Police, CM's Special Vigilance Cell to the Principal Secretary to the Government of Assam, Irrigation Department vide the communication dated 29.01.2014 have approached this Court by filing both the writ petitions.

5. This Court vide an order dated 16.05.2014 in WP(C) No.1989/2014 had issued notice and in the interim status quo was directed to be maintained in respect to the letter dated 29.01.2014 issued by the S.P., Vigilance Cell seeking prosecution sanction against the Petitioner shall not be acted upon until the next date. Similar order was passed on 04.06.2014 in WP(C) No.2707/2014. It is relevant to mention that the said interim orders still continues to hold the field till date.

6. From the submissions so made by the learned counsel for the Petitioners, it is the specific case of the Petitioners in both the writ petitions that the learned Special Judge could not have issued an order in exercise of the powers under Section 156(3) of the Code in Complain Case No.11/2013 for registration of a case under the appropriate provisions of the Act of 1988 without the previous sanction in view of the law laid down by the Supreme Court in the case of **Anil Kumar and Others Vs. M.K. Aiyappa and Another reported in (2013) 10 SCC 705** as well as the judgment of the Supreme Court in the case of **L. Narayana Swamy Vs. State of Karnataka and Others reported in (2016) 9 SCC**



598 wherein the Supreme Court categorically observed that the Magistrate cannot order investigation against the public servant while invoking the powers under Section 156(3) of the Code without the previous sanction. In that regard, reliance was placed to paragraph No.21 of the judgment of the Supreme Court in the case of **Anil Kumar (supra)** as well as paragraph No.16 in the case of **L. Narayana Swamy (supra)**.

Taking into account the above, this Court finds it relevant to reproduce the same. Paragraph No.21 in the case of **Anil Kumar (supra)** read as follows:

“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.”*

Paragraph No. 16 in the case of ***L. Narayana Swamy (supra)*** are also reproduced herein under:

“16. *The second judgment in Anil Kumar referred to above is directly on the point. In that case, identical question had fallen for consideration viz. whether sanction under Section 19 of the PC Act is a precondition for ordering*

investigation against a public servant under Section 156(3) CrPC even at pre-cognizance stage? Answering the question in the affirmative, the Court discussed the legal position in the following manner: (SCC pp. 711-12 & 713-14, paras 13-15 & 21)

“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 and this Court expressed the following view: (SCC p. 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."

14. In *State of W.B. v. Mohd. Khalid*, this Court has observed as follows:

'13. It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out.'

The meaning of the said expression was also considered by this Court in Subramanian Swamy case.

15. The judgments referred to hereinabove clearly indicate that the word "cognizance" has a wider connotation and is not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) CrPC, obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 CrPC and the next step to be taken is to follow up under Section 202 CrPC. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at

pre-cognizance stage.

* * *

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.”

Having regard to the ratio of the aforesaid judgment, we have no hesitation in answering the questions of law, as formulated in para 10 above, in the negative. In other words, we hold that an order directing further investigation under Section 156(3) CrPC cannot be passed in the absence of valid sanction.”

7. It is therefore the case of the Petitioners that the directions so issued vide the order dated 20.08.2013 by the Special Judge, Assam in Complain Case No.11/2013 in terms with Section 156(3) of the Code, the registration of Vigilance P.S. Case No.7/2013, the investigation so carried out and the report

so submitted whereby the Petitioners have been implicated in Vigilance P.S. Case No.7/2013 and the subsequent action on the part of the Superintendent of Police, CM's Special Vigilance Cell, Assam to seek prosecution sanction vide the communication dated 29.01.2014 are contrary to the law declared by the Supreme Court in the aforementioned judgments.

8. Mr. D. Nath, the learned Senior Government Advocate appearing for the State Respondents submitted on the other hand that both the judgments in the case of **Anil Kumar (supra)** as well as in the case of **L. Narayana Swamy (supra)** have been referred to a larger Bench by the Supreme Court in the case of **Manju Surana Vs. Sunil Arora and Others reported in (2018) 5 SCC 557**. In that regard, reference was made to paragraph Nos. 32, 33, 34 and 35 which are reproduced herein under:

“32. We have examined the rival contentions and do find a divergence of opinion, which ought to be settled by a larger Bench. There is no doubt that even at the stage of Section 156(3), while directing an investigation, there has to be an application of mind by the Magistrate. Thus, it may not be an acceptable proposition to contend that there would be some consequences to follow, were the Magistrate to act in a mechanical and mindless manner. That cannot be the test.

33. The catena of judgments on the issue as to the scope and power of direction by a Magistrate under Chapters XII & XIV is well established. Thus, the question would be whether in cases of the PC Act, a different import has to be read qua the power to be exercised under Section 156(3) CrPC i.e. can it be said that on account of Section 19(1) of the PC Act, the scope of inquiry under Section 156(3) CrPC can be said to be one of taking “cognizance” thereby requiring the prior sanction in case of a public servant? It is trite to say that prior sanction to prosecute a public servant for the offences under the

PC Act is a provision contained under Chapter XIV CrPC. Thus, whether such a purport can be imported into Chapter XII CrPC while directing an investigation under Section 156(3) CrPC, merely because a public servant would be involved, would beg an answer.

34. *The apprehension expressed by the learned ASG possibly arises from the observations in Suresh Chand Jain v. State of M.P. followed in Mohd. Yousuf v. Afaq Jahan. Thus, the observations are to the effect that even at a pre-cognizance stage under Section 156(3) CrPC, it is open to the Magistrate to direct the police to register an FIR and that even if the Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.*

35. *The complete controversy referred to aforesaid and the conundrum arising in respect of the interplay of the PC Act offences read with CrPC is, thus, required to be settled by a larger Bench. The papers may be placed before the Hon'ble the Chief Justice of India for being placed before a Bench of appropriate strength."*

9. The learned Senior Government Advocate further submitted by drawing the attention of this Court to the complain petition that the Petitioners were nowhere involved inasmuch as there was no allegations against the Petitioners. The allegations which were made was against one Chief Engineer, Shri Anup Kumar Gohain who was the then Chief Engineer, Minor Irrigation and was holding the post of Chief Engineer, Irrigation Department. In the first report so submitted on 20.09.2013, the Investigating Officer did not find anything against the said Chief Engineer, Irrigation Department. The learned Senior

Government Advocate further submitted that it is only during the course of the investigation so carried out, it was found that the petitioners herein had prepared false demand (progress report) showing 100% physical progress of the Scheme 13th Finance Commission under Mangaldai Division (Irrigation) and forwarded to the authority for release of the fund with some ulterior motive. The learned Senior Government Advocate therefore submitted that even assuming the law as it stands in terms with the judgments of the Supreme Court in the case of **Anil Kumar (supra)** and **L. Narayana Swamy (supra)**, the said judgments are not applicable to the present facts of the instant case inasmuch as in the complain petition as well as also in the directions which were issued on 20.08.2013 by the Special Judge, Assam, there was nothing against the Petitioners. It was only during the course of the investigation, it came to light that the Petitioners had committed offence in terms with Section 13(1)(d)/15 of the Act of 1988 as it stood prior to the Amendment of 2018. Referring to paragraph No.45 of the judgment in the case of **Manju Surana (supra)**, the learned Senior Government submitted that even the Supreme Court in the said judgment after striking out the Respondent No.1 against whom the complain petition was filed from the array of parties observed that if a situation arises when investigation is directed under Section 156(3) of the Cr.P.C. and some materials comes in light to array Respondent No.1 as an accused, the order of the striking out the name of the Respondent No.1 therein would not come in the way.

10. It is therefore the submission of Mr. D. Nath, the learned Senior Government Advocate that as during the course of investigation, it was found that the Petitioners were guilty under Section 13(1)(d)/15 of the Act of 1988 as it stood prior to the Amendment of 2018, the order dated 20.08.2013, the



Registration of the FIR being Vigilance P.S. Case No.07/2013 on 22.08.2013, the report submitted with the opinion of the Investigating Officer that the Petitioners were guilty of offence under Section 13(1)(d)/15 of the Act of 1988 as well as the communication dated 29.01.2014 cannot be said to be in violation to the provisions of law.

11. This Court had perused the materials on record as well as given due consideration to the respective submissions of the parties.

12. It is well settled law that if a judgment is referred to a larger Bench, the proposition of law so enunciated in the said judgment does not lose its efficacy and it continues to remain a binding precedent till overruled by the larger Bench. Therefore, the judgments in the case of **Anil Kumar (supra)** and **L. Narayana Swamy (supra)** holding that previous sanction is required prior to issuance of directions under Section 156(3) of the Code has to be taken as the law as it stand today. This aspect of the matter would further be clear from the judgment in the case of **Manju Surana (supra)** wherein also the Supreme Court had only referred the said issue to the larger Bench as could be seen from Paragraph Nos. 32 to 35 as quoted hereinabove.

13. Be that as it may, taking into consideration the submission of the learned Senior Government Advocate, the question that arises for consideration in the instant case is as to whether the law laid down in the case of **Anil Kumar (supra)** and **L. Narayana Swamy (supra)** would be applicable to the facts of the instant case inasmuch as there was no allegation in the complain petition filed by the Respondent No.5 against the Petitioners in both the writ petition. It was only after the registration of the FIR as Vigilance P.S. Case No.07/2013 and the investigation so carried out, it was found that the Petitioners had committed an

offence under Section 13(1)(d)/15 of the Act of 1988 as it stood prior to 2018 amendment and it is on the basis of the said opinion so submitted by the Investigating Officer, permission was sought for submission of the charge sheet and steps were taken vide the communication dated 29.01.2014 for sanction for prosecution against the Petitioners.

14. Let this Court take a simple example in this regard. "A" who owns a plot of land alleges that "B" had fraudulently manufactured a Deed of Sale in his name in respect to the said plot of land. On the basis thereof, "A" lodges an FIR before the Police Station. The Officer-in-Charge of the said Police Station refuses to register the said FIR. "A" thereafter files an application under Section 156(3) of the Code before the Magistrate complaining the refusal to register the FIR as well as to carry out an investigation. The Magistrate thereupon directs the Officer-in-Charge of the Police Station to register the FIR and investigate and to submit the Final Form. Thereupon, during investigation, it is found that Sub-Registrar who is a public servant and various officials from the Sub-Registry were involved in the manufacture of the fraudulent Deed of Sale as well as also committed offence under Section 7 of the Act of 1988. In such circumstances, if the submissions so made by the learned counsel for the Petitioners are to be accepted, then the entire proceedings from the filing of the application under Section 156(3) of the Code, the order passed under Section 156(3) of the Code by the Magistrate, the investigation and the report so submitted would be bad in law. It is the opinion of this Court that the law laid down in the judgments of the Supreme Court in the case of **Anil Kumar (supra)** and **L. Narayana Swamy (supra)** cannot be construed to mean that if during the investigation it is found that some public servant is involved in commission of a crime, the said investigation as well as the report so

submitted would be a nullity. In the instant case it was during the investigation, it was found that the Petitioners in the writ petitions had committed the offence under Section 13(1)(d)/15 of the Act of 1988 as it stood prior to Amendment of 2018. It is further clarified that the law laid down in the case of **Anil Kumar (supra)** and **L. Narayana Swamy (supra)** would have been applicable if in the complaint petition so filed by the Respondent No.5 directions were sought for under Section 156(3) of the Code against the Petitioners. Paragraph No.45 of the judgment in the case of **Manju Surana (supra)** also clarifies the said aspect and the same is quoted herein under:

“45. We are, thus, of the view that Respondent 1 needs to be struck off from the array of parties both in the present proceedings and consequently in the complaint. We, however, make it clear that if a situation arises where investigation is directed under Section 156(3) CrPC and some material comes to light to array Respondent 1 as an accused, our order would not come in the way.”

15. Taking into account the above discussions as well as the observations of the Supreme Court in paragraph No.45 in the case of **Manju Surana (supra)**, this Court does not find any infirmity in the investigation so carried out in Vigilance P.S. Case No.7/2013 as well as the sanction sought for vide the communication dated 29.01.2014.

16. In that view of the matter, both the writ petitions being devoid of any merits, the same stands dismissed.

17. Before parting with the record, this Court makes it clear that the observations made hereinabove shall in no manner be construed that this Court has expressed any opinion on the manner of the investigation in Vigilance P.S. Case No.7/2013 as well as the report so submitted by the



Investigating Officer. It is clarified that this Court had only dealt with the issue as to whether the previous sanction was required insofar as regards the Petitioners against whom there were no allegations in the Complain Case No.11/2013 and it was during the course of investigation in Vigilance P.S. Case No.7/2013 wherein the Investigating Officer opined that the Petitioners had committed acts constituting the offence under Section 13(1)(d)/15 of the Act of 1988 as it stood prior to the Amendment of 2018.

18. Interim order passed earlier stands vacated.

JUDGE

Comparing Assistant