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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment delivered on:11.01.2019*

\+ **W.P.(CRL) 3247/2018 & Crl. M.A. Nos. 34807-08/2018**

DEVENDER KUMAR ..... Petitioner

Versus

CENTRAL BUREAU OF INVESTIGATION & ORS.....Respondents

\+ **W.P.(CRL) 3248/2018 & Crl. M.A. Nos. 34811-12/2018, 35599/2018**

RAKESH ASTHANA ..... Petitioner

Versus

CENTRAL BUREAU OF INVESTIGATION & ORS.....Respondents

\+ **W.P.(CRL) 3292/2018 & Crl. M.A. Nos. 35067-68**

MANOJ PRASAD ..... Petitioner

Versus

CENTRAL BUREAU OF INVESTIGATION & ORS.....Respondents

Through: Mr. Dayan Krishnan, Sr. Advocate with Mr. Vivek Singh, Mr. Swatik Dalai and Ms. Aakashi Lodha, Advocates for Petitioner in W.P. (Crl.) 3247/2018.
Mr. Amarendra Sharan, Senior Advocate with Mr. Amit Anand Tiwari and Mr. Shashwat Singh, Advocates for Petitioner in W.P. (Crl.) 3248/2018.
Ms. Seema Seth, Advocate for Petitioner in W.P. (Crl.) 3292/2018.
Mr. Vikramjeet Banerjee, Additional Solicitor

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General with Mrs. Rajdipa Behura, Special Public Prosecutor with SP Mr. Satish Dagar, IO.
Ms. Maninder Acharya, Addl. Solicitor General with Mr. Ajay Digpual, CGSC, Mr. Soumava Karhakar, Mr. Sahil Sood, Mr. Harshul Choudhary and Mr. Viplav Acharya, Advocates for UOI.
Mr. Rahul Sharma, Advocate for Respondent No.2.
Mr. M. A. Niyazi, Ms. Anamika Ghai and Ms. Kirti Jaswal, Advocates for Respondent No. 3 in Item Nos. 1 and 2.
Mr. Sunil Fernandes, Ms. Nupur Kumar, Ms. Priyanka Indra Sharma and Mr. Arnav Vidyarthi, Advocates for the Intervenor.
Mr. Shashwat Singh, Ms. Harshal Gupta and Ms. Devyani Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

1. W.P. (Crl.) 3248/2018 shall be treated as the lead case and unless stated otherwise, the expression petitioner shall mean the petitioner in this case. Respondent no. 2 is the Director, CBI, Respondent no. 3 is a Joint Director in the CBI, Respondent no. 4 is the UOI. The petitioner seeks quashing of FIR No. RC 13(A)/2018/AC-III dated 15.10.2018 (in short FIR/RC 2018) registered by the CBI. It is impugned on the ground that it falls foul of the statutory bar under Section 17A of the Prevention of Corruption Act, (in short PC Act). The said provision of law reads as under:

> *"...17.A. Persons authorised to investigate. – Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank, -*
> *(a) In the case of the Delhi Special Police Establishment, of*

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an Inspector of Police;
(b) In the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;
(c) Elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank,

shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:

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

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

FACTS

2. One Mr. Satish Babu (Sana) was being investigated by the CBI in RC No. 2242017A0001 (in short FIR/RC 2017). He has alleged harassment by the Investigating Officer of that case, demand of illegal gratification and extortion by the latter. He had complained of being repeatedly called by the investigating officials and at some stage was promised, through two persons namely Manoj Prasad (Manoj) and Somesh Prasad (Somesh), that in lieu of payment of Rs. 5 crores his harassment i.e. his being called for repeated investigation would cease. The said complaint was given by Sana to the CBI on 15.10.2018 wherein he had stated that he had appeared before Mr.

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Devinder Kumar, DSP on 12.10.2017 in CBI office on subsequent dates as well and had given answers to the query put to him apropos the RC 2017. That in December 2017 he interacted with one Manoj, whom Sana claims to have known for some time; the latter assured him of help in the case because of his proximity with some CBI officers. Manoj introduced the petitioner to his brother Somesh. They spoke to somebody over the telephone and promptly assured Sana again that his problem would be solved and no further CBI notice would be issued to him. However, for this relief an amount of Rs. 5 crores would have to be paid to the CBI officers through Somesh. An advance of Rs. 3 crores would have to be paid, while the remaining amount of Rs. 2 crores would be payable at the time of filing of the Chargesheet in the case and a clean chit would be managed for Sana. The complaint further states that upon inquiries made by him about the CBI Officer, with whom Somesh has spoken over the phone, the latter showed him a Display Profile (DP) on his Whatsapp contact, a picture indicating that that was the officer/person with whom he had spoken and who had assured favours to him in lieu of the payment of Rs. 5 crores. The said picture was of a person in police uniform. Somesh identified the said person as the petitioner in WP(Crl.) No. 3248/2018. Sana claims that later he cross-checked the photograph from the internet (Google website) and found that the photograph of the petitioner was the same as shown to him by Somesh. He states that in the belief that he would be able to get rid of the harassment and mental agony faced by him and his family, he arranged the payment of an amount of Rs. 1 crore to an identified person in Dubai and later paid an amount of Rs. 1.90 crores on 13.12.2017 at 9.25 p.m. to an identified person in Delhi. Sana further states that he subsequently heard a live conversation in a telephone

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call from Sana, which purportedly involved petitioner in WP(Crl.) No. 3248/2018 and some other persons; in the conversation, at one stage, instructions were issued that Sana's case be looked into. Somesh later informed the complainant that the instructions were given by the petitioner. The complaint mentions specific dates on which conversations were held, as well as some of the telephone numbers through which the conversations and monetary transactions were arranged and effected. The complainant laments that despite the said monies (over Rs. 3 crores) having been paid, he did not get any relief. On the basis of the said complaint the FIR bearing no. RC 13(A)/2018/AC-III was registered on 15.10.2018. Hence the aforesaid FIR was registered against, Mr. Rakesh Asthana, Spl. Director, CBI, Devinder Kumar, DSP, Mr. Manoj Prasad, Mr. Somesh Prasad and other public servants and private persons.

3. According to the CBI, Sana's complaint contains grave allegations against persons, including public servants. It makes out a cognizable offence and needs to be investigated.

ARGUMENTS

4. CBI argues that the complaint prima facie disclosed the commission of offences punishable under sections 7, 7A, 13(2), 13(1)(d) of the Prevention of Corruption Act, 1988 (PC Act) and section 120B Indian Penal Code, 1860; that the complainant had specifically stated that he was being unnecessary harassed in order to extort money from him and till now he has been made to pay a sum of more than Rs. 3 crores on different occasions; that he has "already given a statement under section 164 Criminal Procedure Code, 1973 about the facts and circumstances of the case and the manner in which he was made to pay the above amount, for stopping his further harassment and for giving him clean chit in the case; the allegation is that monies have been

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received from him by private persons named in the FIR for handing over to CBI officials".

5. The complainant's statement under section 164 Cr.P.C. was recorded before the Court of Metropolitan Magistrate in the RC 2017 on 04.10.2018. Another statement under section 164 Cr. PC was recorded on 20.10.2018 before the same Court, reiterating the allegations made in the complaint.

6. The petitioner has impugned the registration of the 2018 FIR primarily, on two grounds: (i) that it is in breach of Section 17A of PC Act, which requires prior sanction/ permission from the Government of India before registration of the FIR and (ii) that it is actuated by malice of respondent no.2 against the petitioner.

7. Section 4 of the Delhi Special Police Establishment Act, 1946 (DSPE Act) provides for the scheme of superintendence and administration of special police establishment. It reads as follows:

> *"4. Superintendence and administration of special police establishment. –*
> *(1) The superintendence of the Delhi Special Police Establishment insofar as it relates to investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988), shall vest in the Commission.*
> *(2) Save as otherwise provided in sub-section (1), the superintendence of the said police establishment in all other matters shall vest in the Central Government.*
> *(3) The administration of the said police establishment shall vest in an officer appointed in this behalf by the Central Government (hereinafter referred to as the Director) who shall exercise in respect of that police establishment such of the powers exercisable by an Inspector-General of Police in respect of the police force in a State as the Central Government may specify in this behalf."*

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8. The petitioner argues that in all cases concerning investigation of offences committed under the PC Act, the superintendence of the CBI would vest with the Central Vigilance Commission (CVC), while in other matters it vest with the Central Government, and the administration of the CBI itself vests with its Director; that there is a complete bar on any enquiry or inquiry or investigation into an alleged offence, against a public servant, without the previous approval of the employer Union/State Government.

9. The learned Additional Solicitor General submits on behalf of the CBI that permission under section 17A of Prevention of Corruption Act, 1988 (hereinafter to be referred as the 'Act') would not be at all warranted because the allegations in the complaint, on the basis of which the FIR has been registered after due process, cannot be said to be in discharge of the official functions or duties of the officers against whom allegations have been made.

10. The complainant, Sana, has clearly mentioned that the illegal gratifications were demanded from him or otherwise he was promised that he would be let off in RC 2017, if he were to pay an amount of Rs.5 crores to the middlemen, Manoj and Somesh and the monies would travel up the hierarchal order to senior officials in the CBI. He has mentioned the names of the petitioners. It is argued that, therefore, any advisory issued by the Central Vigilance Commission (CVC) under section 8 of the Central Vigilance Commission Act, 2003 (CVC Act) apropos section 17A of the Act would not be applicable to this case. He, further, contends that because of the nature of the allegations against the public servants, no permission would be required from the competent authority under section 17A of the Act.

11. On behalf of respondent No. 4/UOI, Ms. Maninder Achyarya, the

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learned Additional Solicitor General for India, submits that ordinarily the sanction of the Government of India would be required under section 17A of the Act, however, since no reference has been made by the CBI, there is not much that government can do in the present circumstances, because according to the CBI, the allegations against the government officers do not relate to their actions in discharge of their official duties. She further submits that should any reference be made by the CBI, the matter will be promptly looked into.

12. The learned counsel for respondent No.3 reiterates the basic argument on behalf of the CBI: i.e. no sanction would be required in cases where the conduct of the public servant is not in the discharge of official duties. He refers to the dicta of the Supreme Court in ***Subramanian Swamy vs. CBI, (2014) 8 SCC 682***, which has struck down section 6A of the Delhi Special Police Establishment Act, 1946 (DSPE), which is *pari materia* with section 17A of the PC Act. It is stated that the constitutionality of section 17A of the Act too has been challenged and notice has been issued by the Supreme Court on 26.11.2018.

13. Mr. M.A. Niyazi, the learned counsel for Respondent no. 3 further argues that the sanction would be requisite only when the alleged offence is relatable to a recommendation made or a decision taken by a public servant in the discharge of his official duties; whereas, in the present case, no recommendation or decision was taken by the public servant. Instead the public servant is alleged to have been involved in coercion, extortion and/or demand of illegal gratification during his investigation in RC 2017.

14. He further contends that section 17A of the Act seeks to protect the government officers from unwarranted prosecution for decisions that may be

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taken by them or recommendations made in the discharge of their official duties, but the protection cannot and does not extend to an ostensibly corrupt and criminal act. The allegations against the petitioners constitute corrupt and criminal acts there is no embargo under the said statute for the relevant investigating agency to conduct an 'enquiry' or 'inquiry' or 'investigation' into the alleged offence. He further contends that the petition is replete with unsubstantiated and malicious allegations against respondent No.3; the allegation of bias by respondent No.3; or that he has accepted or agreed to accept illegal gratification of Rs. 2 crores alongwith respondent No.2 is strongly refuted. In ground M of the writ petition, the petitioners have referred to a communication dated 24.08.2018 to the Cabinet Secretary; however, perusal of the said letter would show that respondent No. 3 is not mentioned therein nor there is any whisper of any transaction of money involving respondent No. 3, nor is any amount of money mentioned.

15. Mr. Amit Sibal, the learned Senior Advocate for respondent No. 2 also submits that the object and rationale behind section 17A is to protect public servants in the bonafide discharge of their duties while taking administrative decisions and making recommendations.

16. Mr. Amarendra Sharan, the learned Senior Advocate for the petitioner submits that the gravamen of the accusation against the petitioner is that some third person had sought monies in the name of CBI officials, including the petitioner, on the promise that further notices from the Investigating Officer in 2017 FIR would stop in exchange of illegal gratification of Rs.5 crores, of which Rs. 3 crores are stated to have been paid by the complainant to some third persons. However, in the entire complaint no link has been established with the petitioner and he is being harassed; that there is no shred

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of evidence to show criminality by the petitioner. It is argued that the sanction under section 17A of the Act would be necessary because the petitioner heads the Special Investigation Team (SIT) in RC 2017; the allusion of financial malfeasance by the petitioner would relate to the recommendations or decisions that may be taken regarding the discharge or non-summoning of the complainant. He further submits that it would be extremely easy for the Investigating Agency to circumvent rigours of section 17A by not seeking permission of the Union of India or the relevant State Government or the Competent Authority, merely on the plea that the action of the public servant is not in the discharge of his official functions or duties; that the registration of FIR and initiation of investigation against the petitioner is steeped in mala fides, because the petitioner had earlier written a letter to the Cabinet Secretary on 24.08.2018 apropos certain irregularities by respondents No. 2 and 3. The said letter was referred to the CVC. According to the petitioner, he had sent a Note on 20.09.2018 to respondent No.2 seeking approval for custodial interrogation of four persons. On 24.09.2018, respondent No.2 sought further information and opinion of the Director of Prosecution (DOP) of the CBI, before a decision could be taken. The petitioner contends that the reference of the case to the DOP was neither necessary nor permissible in law.

17. The petitioner further submits that a letter was issued by the CVC to the CBI, directing, *inter alia* that a case should not be registered without prior sanction under section 17A of the Act; that Sana had made a complaint on 15.10.2018 at 8.00 p.m., which was not taken to the Magistrate on the same day and the FIR was registered on the same day. The FIR/RC 2018 reached the Judicial Officer on 17.10.2018 at 11.55 p.m. It is argued that roughly

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eight requisite steps to be completed prior to the registration of an FIR by the CBI; it is not likely that all these could have happened in the course of one day itself. He submits that in breach of provisions of section 157 Cr.P.C., the FIR did not reach the Magistrate forthwith, neither was the FIR uploaded within 72 hours in terms of the directions of the Supreme Court in the case of ***Youth Bar Association of India vs. Union of India &Anr., (2016) 9 SCC 473,*** wherein it was held that:-

> *"11.4 The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category, 6 offences under POCSO Act and such other offences, should be uploaded on the police website, and if there is no such website, on the official website of the State Government, within twenty-four hours of the registration of the First Information Report so that the accused or any person connected with the same can download the FIR and file appropriate application before the Court as per law for redressal of his grievances. It may be clarified here that in case there is connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable to connectivity problems due to geographical location."*

18. The petitioner submits that a bare perusal of the Case Diary and other records would show that the requisite steps for registration of the FIR have not been taken; that there are numerous breaches of the prescribed procedure, would establish that the complaint lacks merit; that charges under section 13(1)(d) of the Act would not be applicable since the said provision of law has ceased to be a part of the statute since 26.07.2018. It is argued that apropos the remaining two sections of the PC Act mentioned in the FIR, two things would be necessary i.e. the government officer/public servant should

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have asked for bribe or payment and received the illegal gratification. In the present case, no demand is alleged to have been made by the petitioner nor is there a proof that the said monies paid by the complainant to a third person ever reached the petitioner; that the allegations against the petitioner are as nebulous as can be. In support of his contentions he has referred to the judgment of the Supreme Court in the case of ***Dashrath Singh Chauhan vs. Central Bureau of Investigation, 2018(13) SCALE 705,*** which held that

> *"32). Since in order to attract the rigors of Section 7, 13(2) read 13(1)(d) of PC Act, the prosecution was under a legal obligation to prove the twin requirements of "demand and acceptance of bribe money by the accused", the proving of one alone but not the other was not sufficient. The appellant is, therefore, entitled for acquittal from the charges framed against him under the PC Act too. (See para 8 of M.K. Harshan vs. State of Kerala, (1996) 11 SCC 720)"*

19. It argued that, therefore, RC 2018 could not be registered, but it having registered cannot be for anything but actuated by malafides.

20. Mr. Dayan Krishnan, the learned Senior Counsel for Devinder Kumar, the petitioner in W.P. (Crl.) 3247/2018 adopts the arguments of Mr. Sharan. Additionally, he submits that in the complaint Devinder Kumar is not mentioned therein and if, at all, there is reference to a demand, it is only with reference to the petitioner in W.P. (Crl.) 3248/2018 and that there is no direct interaction of any demand by Devinder Kumar. He refers to section 8 of the Act, which makes bribe giving an offence under the law. It reads as:-

> ***"8. Offence relating to bribing of a public servant.-*** *8. (1) Any person who gives or promises to give an undue advantage to another person or persons, with intention— (i) to induce a*

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public servant to perform improperly a public duty; or (ii) to reward such public servant for the improper performance of public duty; shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both: Provided that the provisions of this section shall not apply where a person is compelled to give such undue advantage: Provided further that the person so compelled shall report the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such undue advantage: Provided also that when the offence under this section has been committeed by commercial organisation, such commercial organisation shall be punishable with fine. Illustration.—A person, 'P' gives a public servant, 'S' an amount of ten thousand rupees to ensure that he is granted a license, over all the other bidders. 'P' is guilty of an offence under this sub-section. Explanation.—It shall be immaterial whether the person to whom an undue advantage is given or promised to be given is the same person as the person who is to perform, or has performed, the public duty concerned, and, it shall also be immaterial whether such undue advantage is given or promised to be given by the person directly or through a third party. (2) Nothing in sub-section (1) shall apply to a person, if that person, after informing a law enforcement authority or investigating agency, gives or promises to give any undue advantage to another person in order to assist such law enforcement authority or investigating agency in its investigation of the offence alleged against the later."

21. Mr. Krishnan, submits that the bribe-giver did not intimate the Investigating Agency within seven days of alleged demand or payment of bribe. Furthermore, since the complainant himself admitted to having paid the bribes earlier, his conduct and his allegations would be suspect. Reference is made to the judgement of the Supreme Court in ***Lalita Kumari vs. Govt. of U.P. & Ors., (2014) 2 SCC 1***, which held *inter alia*:-

"79) Besides, learned senior counsel relied on the special

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> *procedures prescribed under the CBI manual to be read into Section 154. It is true that the concept of "preliminary 69 Page 70 inquiry" is contained in Chapter IX of the Crime Manual of the 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 the CBI is constituted under a Special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derive its power to investigate from this Act."*

22. Respondent no.2 has strongly refuted the allegations of malafide against him. He contends that seeking the opinion of the DOP was the prudent thing to do in the circumstances. His noting reads as under:

> *"...Put up statements given before ED and CBI of those purposed to be arrested. However DOP should also examine case after perusing the prosecution complaint filed by ED in the Special Court in this case and the evidence available on record in the CBI investigation. He may give his views on the same..."*

23. He further contends that the said noting apropos RC 2017 was an exercise in care and caution and merely because prudence was exercised, or his view was not in consonance with the view of the petitioner, malafides cannot be imputed to him; that for the matter to be examined by the DOP regarding legality of the two cases was to ensure that the case could stand rigorous scrutiny in a court of law; that the reference of the case to the DOP was all the more necessary because the issue of a person being a witness in one case and the accused in another, had been discussed in meetings of inter-

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departmental heads of CBI, ED, IT; that the reference to the DOP was the appropriate, cautious and prudent way forward, lest investigations go in different directions, to jeopardize the cases; the view of the DOP was sought under Chapter 21 of the Crime Manual, whereunder the DOP has to assist CBI officials on various queries and assist that may be referred; that in further exercise of caution legal advice was sought from an Additional Solicitor General for India, apropos not obtaining sanction or prior approval from the Government of India. The advice rendered was: whenever a cognizable offences comes to the notice of law enforcement agency, the FIR must be registered and it should not await the prior approval under section 17A. Respondent no. 2 also refers to the dicta of the Supreme Court in ***Lalita Kumari vs State of U.P.*** (2014) 2 SCC 1, which held that whenever a police officer receives a complaint which discloses the commission of a cognizable offence, he is duty bound to register an FIR thereon. It is argued that the complaint was duly processed in consultation with the head of the branch concerned: AC-III, CBI. It was examined by the Law Officers of the CBI, including the Deputy Legal Advisor, the Addl. Legal Advisor and the Director of Prosecutions. It is after considering the aforesaid records and legal advice that the FIR/RC 2017 was approved as per law and due procedure. He submits that the allegation of bias or malice or malifide against him are baseless. It is argued that sanction under section 19 of the PC Act can be obtained even after the initiation of the investigation.

24. Mr. Amit Sibal, the learned Senior Advocate for respondent No.2 submits that in cases involving payment and acceptance of bribe, section 17A of the Act does not provide protection to a public servant. He submits that section 197 Cr.P.C. is of much wider amplitude, but even that section does

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not provide protection to public servants against whom allegations of the present kind are made; that seeking or accepting bribe while in the discharge of official duty has not only been severely criticised but strongly castigated in various judicial pronouncements. He refers to the judgment of the Supreme Court in the case of ***Sankaran Moitra vs. Sadhna Das & Anr., (2006) 4 SCC 584***, wherein it was held *inter alia*:-

> *"45. So far as the provisions of the Section 197 are concerned, they came up for judicial interpretation in several cases. One of the leading cases which has been referred to in several decisions thereafter was of Dr. Hori Ram Singh vs Emperor, [1939 FCR 159 : AIR 1939 FC 43]. Their Lordships of the Federal Court in Dr. Hori Ram Singh were called upon to consider Section 270 of the Government of India Act, 1935 which was similar to Section 197 of the present Code. Sulaiman, J., interpreting the said section, observed that the question of good faith or bad faith would not strictly arise in interpreting the provision inasmuch as the words used in the section were not only "any act done in the execution of his duty" but also "any act purporting to be done in the execution of duty". It was, therefore, held that when the act is not done in the execution of the duty, but is purported to be done in the execution of the duty, it would be covered.*
>
> *46. The learned Judge stated:*
>
> *"Obviously the section does not mean that the very act which is the gravamen of the charge and constitutes the offence should be official duty of the servant of the Crown. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The words as used in the Section are not "in respect of any official duty" but "in respect of any act done or purporting to be done in the execution of his duty". The two expressions are obviously not identical. The offence should have been committed when an act is done in the execution of duty or when an act purports to be*

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done in the execution of the duty. The reference is obviously to an offence committed in the course of an action, which is taken or purports to be taken in compliance with an official duty, and is in fact connected with it. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction. If the act complained of is an offence, it must necessarily be not an execution of duty, but a dereliction of it. What is necessary is that the offence must be in respect of an act done or purported to be done in execution of duty, that is, in the discharge of an official duty. It must purport to be done in the official capacity with which he pretends to be clothed at the time, that is to say under the cloak of an ostensibly official act, though of course, the offence would really amount to a breach of duty. An act cannot purport to be done in execution of duty unless the offender professes to be acting in pursuance of his official duty and means to convey to the mind of another, the impression that he is so acting."

47. It was, however, stated-

"The section is not intended to apply to acts done purely in a private capacity by a public servant. It must have been ostensibly done by him in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at the time. For instance, if a public servant accepts as a reward a bribe in his office while actually engaged in some official work, he is not accepting it even in his official capacity, much less in the execution of any official duty, although it is quite certain that he could never have been able to take the

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> *bribe unless he were the official in charge of some official work. He does not even pretend to the person who offers the bribe that he is acting in the discharge of his official duty, but merely uses his official position to obtain the illegal gratification." (emphasis supplied)"*

25. Respondent no. 2 submits that for registration of an FIR under sections 384, 468 and 471 of the IPC investigation and sanction would not be required from the appointing authority/Government. It is argued that seeking opinion and advice of the Director of Prosecution cannot be termed as 'mala fide action', especially, in the facts and circumstances of the present case where the complainant is a prosecution witness in the Enforcement Directorate's case against one Moin Qureshi. Therefore, the complaint could well have a bearing on the other case. The advice of the DOP can only be deemed to be prudent and necessary. Indeed, his noting would show that he has sought examination of the issue by the DOP after perusing the prosecution complaint filed by ED in the Special Court in the case, and the evidence available on record in the CBI investigation. He submits that there is nothing on record to bar the appointment of an additional Investigating Officer, if the circumstances so warrant.

26. The CBI too submits that when circumstances so warrant, especially in the peculiar circumstances of this case, an additional Investigating Officer could be appointed and it was rightly so appointed.

27. The petitioner refers to the statement of Sana before the CBI on 01.09.2018 and submits that the alleged promise was: that the CBI Director concerned would be spoken to by a Member of Parliament. Mr. Sibal submits that respondent No.2 has not been specifically mentioned. The petitioner contends that the very next paragraph refers to the CBI Director,

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but Mr. Sibal insists that even in the latter paragraph, name of the CBI Director is not mentioned.

28. Referring to the said statement of Sana, Respondent no. 2 contends that it was made at CBI, HQ, Delhi on 1.10.2108 (sic) but oddly on the second page, the complainant ends it with date 01.09.2018, therefore no credence could be given to it against respondent no. 2. He submits that the statement before the Magistrate would have to be read sequentially, which would show that the reference to the "concerned Director" (sic) would be the petitioner. Furthermore, the said complainant has re-iterated the same statement under section 164 Cr.P.C in RC 2018. He submits that reference to the letter of the petitioner of 24.08.2018 is misleading because the apprehensions expressed therein are primarily apropos the petitioner's ACR being spoiled by R-2; but the ACR had already been signed and uploaded on respondent no. 2's site on 10.07.2018. He submits that reference to ***Youth Bar Association of India*** *(supra)*, is mis-directed because para 11.3 provides supply of certified copy of the FIR to the accused within two working days. The relevant para reads as under:-

> *" 11.3 Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C."*

29. In his counter affidavit, respondent No.2 states *inter alia*:-

> *"6. It is submitted that Respondent No. 2 has been dragged in this petition only to malign his image and that of other officers*

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of the Respondent No.l CBl. It is stated that FIR dated 15.10.2018 is based on complaint dated 15.10.2018 preferred by one Shri Satish Babu Sana (the complainant) and statement of the said complainant recorded under Section 164 Cr. PC on 4.10.2018. The said complainant made another Section 164 Cr. PC statement on 20.10.2018 reiterating his earlier Section 164 Cr.P.C. statement and contents of the complaint of 15.10.2018. The complaint was duly processed in consultation with Head of Branch, AC-111, CBI, New Delhi. The vetting was done by the Law Officers of the CBI including Deputy Legal Advisor (DLA), Additional legal Advisor (ALA) and the Director of Prosecution (DOP). It is a matter of record that the aforementioned officers, after examining the relevant records and considering the remarks of all the relevant officers, including the Legal Officers, the Competent Authority i.e. Respondent No. 2 herein approved the registration of the FIR/RC. The registration of the FIR/RC is in compliance of all the existing laws, regulations and it has been registered after following the due procedure. The complainant Shri Satish Babu Sana has raised serious allegations of corruption, extortion, serious malpractices and high-handedness against the Petitioner in handling the particular case and therefore, after having received the complaint of the serious nature, it was, but incumbent on the responsible officers of CBI to register the FIR/RC.

7. It is stated that FIR No. 13 A/2018 was registered on the basis of complaint dated 15.10.2018 of Sathish Babu Sana in AC 3 branch. In the said complaint, Sathish Babu Sana had stated that he had already disclosed gist of facts of the complaint dated 15.10.2018 before the Hon'ble Court in his earlier statement recorded U/s 164 of Cr.PC at Delhi. It is pertinent to mention that the aforesaid statement of Satish Babu Sana was recorded u/s 164 of Cr PC on 4.10.2018 in Saket Courts, Delhi in CBI case RC 2242017A0001 registered against Moin Akhtar Qureshi and others. The other statement of Sathish Babu Sana was recorded on 20.10.2018 u/s 164 of CrPC in CBI RC 13(A)/2018/AC 3/New Delhi in the Saket Courts in which he reiterated the facts already stated by him in

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> *his earlier statement recorded on 4.10.2018 and complaint given on 15.10.2018.*
>
> *8. The allegations levelled in the complaint, which has resulted in the FIR/RC dated 15.10.2018 are of very serious nature which require thorough investigation as it discloses various factual averments which includes particulars of several persons, various mobile numbers, and travel details. The above said particulars/materials mentioned in the FIR are required to be thoroughly examined and investigated to bring out the truth."*

30. R-2 further argues that the learned Special Judge/Trial Court has recorded, inter alia, that there was creation of false evidence by the petitioner-Devinder Kumar; searches were conducted by the CBI at the office chamber and residential premises of the accused and number of documents have been seized during these searches; that the accused has tried to create false evidence during investigation in RC 2017 and has refused to cooperate in the investigation; that the learned Trial Court recorded the submission of the Special Public Prosecutor of the CBI, alongwith Investigating Officer DSP Ajay Kumar Bassi. Respondent no. 1, the CBI too concurs. It is argued that in cases where ex-facie cognizable offence is made out, registration of an FIR is to be done and investigation would ensue, even if there are subsequent allegations of *mala fides*. He refers to the judgment of the Supreme Court in the case of ***Sanapareddy Maheedhar Seshagiri & Anr. vs. State of Andhra Pradesh & Anr. (2007) 13 SCC 165,*** which held that:-

> *"28. In State of Haryana v Bhajanlal [1992 Supp. (1) SCC 335] this Court considered the scope of the High Court s power under Section 482 of Cr.P.C and Article 226 of the Constitution to quash the FIR registered against the respondent, referred to several judicial precedents including*

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those of R.P.Kapoor v. State of Punjab (supra), State of Bihar v. J.A.C. Saldanha [1980 (1) SCC 554] and State of West Bengal v. Swapan Kumar Guha [1982 (1) SCC 561] and held that the High Court should not embark upon an enquiry 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, the Court identified the following cases in which the FIR or complaint can be quashed.

(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

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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.

29. The ratio of Bhajan Lal s case has been consistently followed in the subsequent judgments. In M/s Zandu Pharmaceutical Works Ltd. V. Mohd. Sharaful Haque (supra), this Court referred to a large number of precedents on the subject and observed:

"11.....the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded

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with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. It if appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that even there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings."

In the aforementioned judgment, this Court set aside the order of the Patna High Court and quashed the summons issued by the First Class Judicial Magistrate in Complaint Case No.1613) of 2002 on the ground that the same was barred by limitation prescribed under Section 468 (2) Cr.P.C.

30. In Ramesh Chand Sinha s case (supra) this Court quashed the decision of the Chief Judicial Magistrate, Patna to take cognizance of the offence allegedly committed by the appellants by observing that the same was barred by time and there were no valid grounds to extend the period of limitation by invoking Section 473 Cr.P.C.

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31. A careful reading of the above noted judgments makes it clear that the High Court should be extremely cautious and slow to interfere with the investigation and/or trial of criminal cases and should not stall the investigation and/or prosecution except when it is convinced beyond any manner of doubt that the FIR does not disclose commission of any offence or that the allegations contained in the FIR do not constitute any cognizable offence or that the prosecution is barred by law or the High Court is convinced that it is necessary to interfere to prevent abuse of the process of the court. In dealing with such cases, the High Court has to bear in mind that judicial intervention at the threshold of the legal process initiated against a person accused of committing offence is highly detrimental to the larger public and societal interest. The people and the society have a legitimate expectation that those committing offences either against an individual or the society are expeditiously brought to trial and, if found guilty, adequately punished. Therefore, while deciding a petition filed for quashing the FIR or complaint or restraining the competent authority from investigating the allegations contained in the FIR or complaint or for stalling the trial of the case, the High Court should be extremely careful and circumspect. If the allegations contained in the FIR or complaint discloses commission of some crime, then the High Court must keep its hands off and allow the investigating agency to complete the investigation without any fetter and also refrain from passing order which may impede the trial. The High Court should not go into the merits and demerits of the allegations simply because the petitioner alleges malus animus against the author of the FIR or the complainant. The High Court must also refrain from making imaginary journey in the realm of possible harassment which may be caused to the petitioner on account of investigation of the FIR or complaint. Such a course will result in miscarriage of justice and would encourage those accused of committing crimes to repeat the same. However, if the High Court is satisfied that the complaint does not disclose commission of any offence or prosecution is barred by limitation or that the proceedings of criminal case would result

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> *in failure of justice, then it may exercise inherent power under Section 482 Cr.P.C."*

31. The learned ASG submits on behalf of the CBI that there is no bar in the CBI Manual for the appointment of an additional Investigating Officer in a pending case, should the circumstance so warrant. He submits that the CBI Manual is only an aid/guidance for investigations. It cannot, in any way, encumber the intrinsic powers of the Bureau to investigate a case thoroughly. He relies upon the dicta of the Supreme Court in the case of ***Lalitha Kumari*** (supra), which holds, in effect, that in the event of a cognizable offence, an FIR can be registered and investigation would ensue. Credibility of the information is to be tested at the time of appreciation of evidence by the court. He also relies upon the judgment of the Supreme Court in the case of ***Tilly Gifford vs. Michael Floyd Eshwar & Anr. (2018) 11 SCC 205***, which holds that the exercise of jurisdiction under section 482 Cr.P.C. has to be sparingly exercised except in circumstances where the case is so glaring that FIR could not have been registered or it is tainted by clear *mala fides*, the criminal investigation should not be foreclosed by a court of law. It held *inter alia*:-

> *"3. A perusal of the order of the High Court released on 21.05.2015 would indicate that the High Court has gone far beyond the contours of its power and jurisdiction under Section 482 Cr.P.C. to quash a criminal proceeding, the extent of such jurisdiction having been dealt with by this Court in numerous pronouncements over the last half century. Time and again, it has been emphasized by this Court that the power under Section 482 Cr.P.C. would not permit the High Court to go into disputed questions of fact or to appreciate the defence of the accused. The power to interdict a criminal proceeding at the stage of investigation is even more rare. Broadly speaking,*

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a criminal investigation, unless tainted by clear malafides, should not be foreclosed by a Court of Law.

7. On a consideration of the statements of the persons examined in the course of investigation, referred to above, as well as the statements of other such persons examined, findings were recorded by the Enquiry Officer in his report submitted to the High Court which, inter alia, is to the following effect:-

"On 2.3.2013, a complaint was lodged with Nazarbad PS of Mysore City by Eward Joubert Vaningen wherein he was accompanied by Tilly Gifford, Ajit Lobo and Marina Meyn. The then PI, Nazarbad police station Mr. Mohan did not act on the complaint immediately and the same complaint was considered only on 11.3.2013 at 18.45 hours wherein a criminal case was registered vide Nazarbad police station Cr.No.46/13 u/s 403-409-420 and 464 IPC. The original complaint of Edwin Joubert Vaningen was missing from the case file. Serious procedural lapses in registration of the FIR was seen and the misplaced original complaint and the delay in the registration of the FIR till 11.3.2013 (day prior to the death of Edwin Joubert Vaningen) raise serious doubts regarding the reasons for such delay. The delay in taking action on the complaint of Edwin Joubert Vaningen between 2.3.2013 to 11.3.2013 only benefits Michael Floyd Eshwer. The delay and the advantage it gives to Michael Floyd Eshwer would safely permit us to conclude that omission and commissions by then PI of Nazarbad police station Mr. Mohan and the then DCP Shri Basavaraj Malagatti were at the behest of Michael Floyd Eshwer."

8. We have extracted the aforesaid findings (which clearly appear to be against the respondent-accused) only to highlight the fact that the statements on which reliance has been placed have been appreciated by the Inquiry Officer and conclusions have been drawn and reached, which fact would be suggestive of an imminent requirement of appreciation of materials to be unravelled by a proper investigation so as to arrive at the necessary findings on the core issue i.e. the legal existence of a

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> *valid F.I.R. However, taking into account the fact that the inquiry was conducted pursuant to the order of the High Court to unravel the truth surrounding the lodging of the F.I.R. and was not a step in the investigative process which, in any case, has been interdicted by the High Court by the impugned order, we do not consider it prudent to come to one conclusion or the other with regard to the said findings. However the findings of the inquiry would clearly indicate that a large volume of material facts surrounding the lodging of the F.I.R. and its authenticity needs to be investigated and the truth unravelled. But this is what has been interdicted by the High Court. In the above situation, we find ourselves unable to agree with the view taken by the High Court. On the contrary, we are of the opinion that the F.I.R. in question should be fully investigated in accordance with law and thereafter further legal consequences as may be warranted should be allowed to take effect. We order accordingly and direct the completion of the investigation within sixty days from today, whereafter steps in accordance with law will follow."* *(emphasis supplied)*

32. With reference to the above, the learned ASG submits that there are no allegations of *mala fides* apropos the investigations being presently carried out by a new Investigating Officer; that even in Tilly Gifford's (supra), the allegation was that the forged documents had formed the basis of the registration of the FIR, hence quashing of the criminal investigation was sought. However, the Supreme Court rejected the petition and directed completion of the investigation in a fixed time schedule. The learned ASG asserts that the investigation must go on, that there is no merit in the petition and it should be dismissed.

33. The learned ASG states, upon instructions, that the CBI has received a set of documents from respondent no. 3, purportedly containing sensitive documents referring to the case; they contain *inter alia* transcripts of

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telephone conversations between the main dramatis personae.

ANALYSIS

34. What has been alleged by the complainant is that he was coerced, intimated and lured to part with certain monies for promise of providing him relief from repeatedly being called for investigation by the investigating officer Mr. Devinder Kumar in RC 2017 and finally to be let off the hook. Before parting with any monies i.e. the alleged payment of over Rs. 3 crores, out of the total demanded amount of Rs. 5 cores, the complainant claims to have satisfied himself that the promise of relief to him had the approval of CBI senior officers, including the petitioner in W.P.(Crl.) 3248/2018, whose photographs were shown to him by Somesh on the latter's telephone, after an alleged telephone conversation with the said person in this regard. The complainant has alleged that in another conversation the voice directing that Sana's matter be looked into, was told to be of the petitioner. He has given a statement under section 164 of the Cr.P.C. to this effect. His complaint dated 15.10.2018, alludes to element of threat, extortion and other criminal offences covered under the IPC. Indeed the CBI has added sections 384, 388, 389, 468 and 471 of the IPC in RC 2018.

35. Section 7 of PC Act, stipulates that any public servant who obtain or accepts or attempts to obtain from any person an undue advantage with intention to perform or cause performance of public duty improperly or dishonestly or to cause the forbearance to perform such duty either by himself or by another public servant would have committed an offence under the said section. Even the act of a public servant to perform to such improper or dishonest public duty, including for a reward, is a punishable offence under the said section. In the aforesaid section, the element of threat or

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coercion is not specifically mentioned. The said section does not necessarily cover the element of threat and coercion as alleged by the complainant in the present case. According to the Illustration to Explanation (i) of section 7 of the PC Act, a person would be guilty of offence under the said section if he asks a public servant to give him an amount of five thousand rupees to process his routine ration card application on time. The nature of the offence contemplated under section 7 of PC Act is different. The complexion or nature of a case depends on its essential ingredients – the facts. If the allegations are over-whelming by under the IPC, then the case will be so construed.

36. Sana has complained that despite his having paid over Rs. 3 crores, he was repeatedly called for investigation by the Investigating Officer; when he complained about the same to Manoj, the latter informed him that all this was happening due to non-payment of balance amount i.e. Rs. 2 crores. Taking the statement of the complainant on face value an element of coercion and threat can be gleaned. The complainant refers to communication through telephone calls, Whatsapp messages and transaction of monies through persons both outside as well as inside the country, to substantiate his allegation that monies have been extorted from him through threat, on the promise that he will ultimately be let off only when he gives the monies. The web of these conversations, electronic messages and transfer of monies seek to cover or involve the public servants in the alleged transaction. Whether the petitioners are at all complicit, as alleged, would be revealed only in further investigation. However, the alleged promise to the complainant to ultimately giving him relief in RC 2017 and/or investigating officer ceasing to call him for further investigations, cannot be said to be in the discharge of

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official functions or duties of the public servant (Investigating Officer) and other persons mentioned in the FIR. The bar to enquiry or inquiry or investigation under Section 17A of the PC Act is apropos such alleged offence as may be relatable to any recommendation made or decision taken by a public servant in discharge of his official functions or duties. In the present case there is no recommendation or decision on record by a public servant in the discharge of his official functions. It was only the discharge of official functions that could have become the subject matter for seeking approval of the employer i.e. the Central Government. The proviso to Section 17A stipulates: "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". This Proviso clearly refers to cases where the charge is of accepting or attempting to accept undue personal advantage for himself or for any other person. The purpose of Section 17A can be read to be only to provide protection to officers/public servants who discharge their official functions and/or duties with diligence, fairly, in an unbiased manner and to the best of their ability and judgment, without any motive for their personal advantage or favour. A public servant cannot be possibly left to be under the constant apprehension that bonafide decisions taken by him/her would be open to enquiry or inquiry or investigation, on the whimsical complaint of a stranger. Section 17A as it reads and the legislative intent in its enactment can only be to protect public servants in the bonafide discharge of official functions or duties. However, when the act of a public servant is ex-facie criminal or constitutes an offence, prior approval of the Government would not be necessary.

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37. The complainant –Sana has alleged coercion, threat and extortion of money, albeit for an offence under Section 7 of the PC Act as well, but such acts by a public servant cannot be said to be in the discharge of his official function or duties. Therefore, in the present case, the approval under Section 17A of the Act would not be necessary.

38. Whether the petitioners/ public servants were at all involved in the offence would be known only after a thorough inquiry by the investigating agency. No doubt, registration of the FIR and the corollary investigation would be a cause for much concern, stress and embarrassment for any honest public servant and others related to him. Nevertheless, where a cognizable offence is made out, the law must take its course. For the sake of public servant and indeed for all concerned, it is best that the investigations are conducted expeditiously and the integrity of the public servant which comes under a cloud because of the investigation is either restored or determined as per law. Nothing much turns upon the fact that the FIR has been registered under the repealed section 13(1)(d) of the PC Act as well; the said section would be redundant. Nevertheless section 120B IPC and Section 7, 7A and 13(2) of the PC Act along with other provisions of the IPC which have been subsequently added to the FIR/RC 2018 would continue.

39. The grievance of the petitioners is that they are senior officers and their integrity cannot be doubted, all the more so because they are a part of the SIT of the CBI, a central investigating agency and Sana's complaint and RC 2018 is only to interfere with the investigation in RC 2017. The law, however, is otherwise. The law does not entertain personalities. It treats all equally. India is country governed by the Rule of Law. An immutable principle of equality is: "Be you ever so high, the law is above you". We must constantly

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remind ourselves of the said principle in the administration of justice. However, it is equally important principle that the law presumes a person to be innocent till proven guilty. All persons against whom investigations are initiated would be presumed to be innocent till such time that they are proven guilty. The persons concerned would have to bear with the process of law. However, it is desirable that the process must come to a conclusion expeditiously. The fair name of a public servant is perhaps his/her most cherished possession and would be guarded most fiercely. Such reputation precedes the social and official interaction of the public servant. It is more than a calling card.

40. The petitioners' have contended that an additional investigating officer could not have been appointed for recording of statement of Sana in RC 2017 and that the such appointment was in breach of law. The Court is not persuaded by this contention, because when there are serious allegations against the IO of a case and a complaint is made to the administrative head of that investigating agency, it would be logical for the administrative head to appoint an additional IO to record such statement under section 164 Cr.P.C. The prudence of administrative head in not removing or disturbing the investigating officer till the recording of such statement cannot be doubted nor can the serious allegation against the IO be left uninvestigated. In the present circumstances, the appointment of the additional IO for recording of statement of the complainant on 04.10.2018 under section 164 Cr.P.C. cannot be stated to be illegal. The petitioners' contention that once the statement was recorded under Section 164 Cr.P.C. the CBI ought not to have waited for the Sana's complaint of 15.10.2018 for registration of RC 2018, too is untenable.

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41. The petitioner further argues that the registration of the FIR on the basis of the complaint of Sana dated 15.10.2018 is barred by Section 162 of the Cr.P.C. It is argued that Sana's statement of 04.10.2018 had not been reduced in an FIR, instead his subsequent statement, the complaint has been registered as the FIR and the same falls foul of section 162 of the Cr.P.C. It is argued that a combined reading of sections 154, 156 and 162 of the Cr.P.C. would reveal that only first statement/complaint has to be recorded into an FIR and no subsequent statement can be recorded in the FIR. The petitioner relies upon various judgments in this regard being:

(i) ***Andhra Pradesh vs Punati Ramulu & Ors. 1994 Supp (1) SCC 590*** para 5:

> *"…. 5. According to the evidence of PW 22, Circle Inspector, he had received information of the incident from police constable No. 1278, who was on 'bandobast' duty. On receiving the. information of the occurrence, PW 22 left for the village of occurrence and started the investigation in the case. Before proceeding to the village to take up the investigation, it is conceded by PW 22 in his evidence, that he made no entry in the daily diary or record in the general diary about the information that had been given to him by constable 1278, who was the first person to give information to him on the basis of which he had proceeded to the spot and taken up the investigation in hand. It was only when PW 1 returned from the police station along with the written complaint to the village that the same was registered by the circle inspector, PW 22, during the investigation of the case at about 12.30 Noon, as the F.I.R., Ex. P-1. In our opinion, the complaint, Ex. P-1, could not be treated as the F.I.R. in the case as it certainly would be a statement made during the investigation of a case and hit by Section 162, Cr.P.C. As a matter of fact the High Court recorded a categorical finding to the effect that Ex. P-1 had not been prepared at Narasaraopet and that it had "been brought into existence at Pamidipadu itself, after due deliberation". Once we find that the*

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> *investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stooped to fabricate evidence and create false clues. ..."*

(ii) He also relies upon ***State of M.P.V. Ratan Singh & Ors. 2018 (15) SCALE 751*** and ***Deo Pujan Thakur & Ors. Vs State of Bihar 2005 Crl.L.J. 1263***

42. In ***Gurusami Naidu @ Chinnasami vs Villis Guruswami Naidu AIR 1951 Mad 812*** relied upon by the petitioner the Court held that whether a particular information amounts to a FIR or not, is essentially a question of fact.

43. The petitioner contends that respondent no.2 has maliciously got the FIR RC 2018 registered because if Sana's statement of 04.10.2018 were the first information then it was always open to the CBI to lay a trap in the case, especially because they had six days till 10.01.2018, when the sum of Rs .25 lacs is stated to have been paid by Sana to some person: this payment being in continuation of and being a part of the alleged payments of Rs. 3 crores. The court finds the said argument untenable because setting up of a trap is not mandatory for an investigating agency. It is always open for the agency to take appropriate and prudent steps on the basis of such information as may have come to it. Whether a trap is to be laid is a call for the agency to take. The statement dated 04.10.2018 was about what was happening in the

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investigation of RC 2017, whereas the subsequent alleged payment of Rs. 25 lacs on 10.10.2018 was an additional fact which was disclosed to the CBI in the complaint of 15.10.2018. The Court is of the view that Sana's complaint dated 15.10.2018, which largely reiterates the substance of the statement made on 04.10.2018, the matter would require to be investigated. The statement recorded on 04.10.2018 was regarding the conduct of the Investigating Officer in the 2017 FIR to a Court, whereas the complaint dated 15.10.2018 is the first information to a police officer. Hence registration of the FIR on the basis of the specific complaint which largely reiterates the previous statement, is not irregular or illegal. The letter of the CVC dated 15.10.2018, largely contains general directions and is not related to the present case. The Court is unable to agree that the freedom and independence of the CBI to investigate into an FIR registered by it could be impeded by such directions.

44. The petitioner's contention that the FIR has been back-dated and documents have been fabricated to falsely implicate them is not borne out from the records. The Court's attention is drawn to the handing over and taking over memo between DSP, CBI AC-III and SP, CBI AC-III on 24.10.2018. Item no. (IX) of the said document shows that a letter had been issued by the DSP on 15.10.2018 to the OS, CBI AC-III requesting issuance of CD Book for the purpose of investigation of case RC. 13(A)/2018/AC-III/CBI, New Delhi. The clerk concerned has given his remarks on the letter that Case Diary Books are not available in the store. Logically, if the said remark has been made apropos the request/letter dated 15.10.2018, it cannot be said to be ante-dated because RC 2018 was registered on 15.10.2018.

45. The petitioner has further argued that there was a five days' delay in

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uploading the FIR on the website of the CBI, hence it is in clear contravention of law. The Court would note that Youth Bar Association (supra) provides ample scope in paras 11.4 and 11.6 reproduced herebelow to deal with circumstances such as the present, when it is not possible for uploading of FIRs on the website of the CBI within 72 hours.

> *"..11.4. The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under the POCSO Act and such other offences, should be uploaded on the police website, and if there is no such website, on the official website of the State Government, within twenty-four hours of the registration of the first information report so that the accused or any person connected with the same can download the FIR and file appropriate application before the court as per law for redressal of his grievances. It may be clarified here that in case there is connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable o connectivity problems due to geographical location.*
>
> *...*
>
> *11.6 The word "sensitive" apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy regard being had to the nature of the FIR. The examples given with regard to the sensitive cases are absolutely illustrative and are not exhaustive. ...."*

46. The CBI considers the case to be of a sensitive nature, hence it chose not to upload it and supplied a copy of the same to the Trial Court on 17.10.2018.

47. The petitioners' letter dated 24.08.2018 written to the Cabinet Secretary complains about what he considered a concerted malicious

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campaign against him by the Director, CBI and a Jt. Director of the Enforcement Directorate, to tarnish his image by unverified and unsubstantiated information being leaked to the media etc. He complained that this was with the intention to demoralise him and harass him and the Director CBI was out to spoil his annual performance appraisal report for the year ending 30.03.2018 and some disgruntled elements were planning to file a PIL against the petitioner on the basis of baseless allegations. The petitioner claimed that he had an unblemished record and had handled various sensitive matters but attempts were being made to demotivate him and to damage his reputation and career. The petitioner also referred to a Note containing information to the effect that attempts were being made by respondent no.2 to influence the investigation in a pending case. The influence was allegedly by way of a telephone call by respondent no.2 to the petitioner on SIP/Phone, to the effect that Sana be not examined. It was the view of the petitioner that Sana had managed to influence respondent no.2 to avoid any coercive action against him by the CBI. The Note also alludes to large sums of monies having been extorted from Sana or otherwise given by him to influence on-going investigation by CBI. The Note does not refer to any direct involvement of respondent no.2 in RC 2017 except for the alleged telephone call to the petitioner on SIP phone.

48. Although Sana's complaint dated 15.10.2018 lists a certain sequence of events and details some facts, it does not mention any direct interaction with the petitioners apropos Rs. 5 crores or any promise of leniency towards him. Sana's conversations were all along with Somesh and Manoj. It is not known whether Somesh or Manoj spoke to the petitioner or to any other

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officer of the CBI, in the presence of such officers. Whether the said persons ever had any conversation with the CBI officials/ public servant concerned is to be ascertained. The claim of Somesh that he managed investment of the petitioner in Dubai and London for many years or that the latter had stayed at the former's home in London is also not ascertained thus far.

49. In view of the preceding discussion and the dicta of the Supreme Court in Sanapareddy Maheedhar Seshagiri (supra) and Tilly Gifford (supra), the Court not persuaded that the case warrants quashing of RC 13(A)/2018/AC-III dated 15.10.2018.

CONCLUSION:

50. The grounds of malafides of Respondent no.2 in registering the FIR: RC 2018, are not made out. Nor can the allegations against the petitioner be conclusively ruled out at this stage. In view of the above, the petitions are dismissed. The interim order dated 23rd October, 2018 stands vacated. In the interest of justice, the investigations must come to an end as soon as practicable. In the circumstances, the CBI is directed to conclude the investigations in ten weeks from today.

NAJMI WAZIRI, J.

JANUARY 11, 2019
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