IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CRIMINAL APPLICATION NO. 207 of 2016
With
R/SPECIAL CRIMINAL APPLICATION NO. 5338 of 2015
With
R/SPECIAL CRIMINAL APPLICATION NO. 8971 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO
	CIRCULATE THIS JUDGEMENT IN THE SUBORDINATE COURTS.	

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PARSHOTTAM ODHAVJIBHAI SOLANKI
Versus
STATE OF GUJARAT

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Appearance:

IN SPECIAL CRIMINAL APPLICATION NO.207 OF 2016:
MR DILIP P JOSHI(1819) ADVOCATE for the PETITIONER(s) No. 1
MR VIRAT G POPAT(3710), ADVOCATE for the PETITIONER(s) No. 1
MR MC BHATT, SENIOR ADVOCATE WITH MR VIKRAM J THAKOR(2221) ADVOCATE for the RESPONDENT(s) No. 2
MR DHARMESH DEVNANI, APP(2) for the RESPONDENT(s) No. 1

IN SPECIAL CRIMINAL APPLICATION NO.5338 OF 2015:
MR RH RUPARELIYA(6212) ADVOCATE for PETITIONER(s) No. 1
MS.NEHA R RUPARELIYA(6361) ADVOCATE for PETITIONER(s) No. 1
MR MC BHATT, SENIOR ADVOCATE WITH MR VIKRAM J THAKOR(2221), ADVOCATE for the RESPONDENT(s) No. 2
MR DHARMESH DEVNANI, APP(2) for the RESPONDENT(s) No. 1

IN SPECIAL CRIMINAL APPLICATION NO.8971 OF 2017:
MR DILIP P JOSHI(1819) ADVOCATE for the PETITIONER(s) No. 1
MR MC BHATT, SENIOR ADVOCATE WITH MR VIKRAM J THAKOR(2221) ADVOCATE for the RESPONDENT(s) No. 3
MR DHARMESH DEVNANI, APP(2) for the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

Date : 21/12/2018

CAV COMMON JUDGMENT

1 Since the issues raised in all the captioned petitions are the same and the challenge is also to the selfsame order passed by the Special Judge issuing process against the accused applicants for the offence punishable under the provisions of the Prevention of Corruption Act, 1988, those were heard analogously and are being disposed of by this common judgment and order.

2 Avarice is a common frailty of mankind and Robert Walpole's famous pronouncement that all men have their price, notwithstanding the unsavoury cynicism that it suggests, is not very far from truth. As far back as more than two centuries ago, it was Burke who cautioned: “Among a people generally corrupt, liberty cannot last long”. In more recent years, Romain Rolland lamented that France fell because there was corruption without indignation. Corruption has, in it, very dangerous potentialities. Corruption, a word of wide connotation has, in respect of almost all the spheres of our day to day life, all the world over, the limited meaning of allowing decisions and actions to be influenced not by the rights or wrongs of a case but by the prospects of monetary gains or other selfish considerations. If even a fraction of what was the vox pupuli about the magnitude of corruption to be true, then it would not be far removed from the truth, that it is the rampant corruption indulged in with impunity by highly placed persons that has led to economic unrest in this country. If one is asked to name one sole factor that effectively arrested the progress of our society to prosperity, undeniably it is corruption. If the society in a developing country faces a

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menace greater than even the one from the hired assassins to its law and order, then that is from the corrupt elements at the higher echelons of the Government and of the political parties. It is one of the greatest challenges before the humanity. It also lies at the root of several other problems facing the humanity. Corruption can perhaps be described as the biggest factor responsible for failure and near-collapse of legal and moral fibre of the nations and societies the world over. It undermines the freedom of an individual, weakens the rights of the people, threatens the very existence of the democratic institutions, and jeopardises the safety and security of the state. If governance is a matter of joke today, making it a laughing stock and leaving it in a pitiable situation, and if cynicism towards the system is the order of the day, the full blame therefor should perhaps go to corruption. Development is perhaps the biggest victim of corruption, having suffered adversely due to its ill-effects. Hundreds of millions of people are compelled to live below poverty line with no sight of hope. Physical infrastructure development, such as roads, railways, bridges, water supply, electricity, etc., and the human infrastructure such as the education, health, etc., all take a beating, quantitatively and qualitatively, due to the omnipresent corruption. The problem of corruption is more acute in a developing country like India where this villain has fully abducted the development from the lives of people.

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3 For the sake of convenience, the Special Criminal Application No.207 of 2016 is treated as the lead matter.

4 By this writ application under Article 226 of the Constitution of India, the writ applicant, a member of the Gujarat State Legislative Assembly and a sitting Minister, has prayed for the following reliefs:

“a) YOUR LORDSHIPS may be pleased to admit and allow this

application;

b) YOUR LORDSHIPS may be pleased to quash and set aside the order dated 12.08.2015 passed by the learned Additional District Judge, Gandhinagar in Criminal Enquiry No. 1 of 2012 at Exhibit-1,wherein directions issued to Registry, Criminal Branch. To .register case and issue process against the petitioner.

c) To quash and set aside the order dated 17.08.2015 passed at Exhibit-l in Special Case (ACB) No.4 of 2015 by the Incharge Principle District Judge, Gandhinagar against the petitioner.

d) Pending admission, hearing and final disposal of this application Your Lordships may be pleased to stay the operation, implementation and proceedings of Special Case (ACE) pending the Court of Additional District Judge, Gandhinagar and stay the further effects and operation of the process issued in pursuance of order dated 12.08.2015 passed in Criminal Enquiry No. 1 of 2012 against the petitioner.

e) This Hon'ble Court may please to grant any other and further relief as may be deemed fit and proper in the facts and circumstances of the case and in the interest of justice."

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5 It appears from the materials on record that one Ishak Mohmmad Maradia, a resident of village: Bhagal, Taluka : Palanpur, District : Banaskantha filed a private complaint in the Court of the Special Judge (Prevention of Corruption), Gandhinagar, against the writ applicant herein for the offence punishable under Sections 7, 8, 13(1)(a) and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 (for short, 'the Act, 1988').

6 The English translation of the complaint reads as under:

"Complaint under Section 7, 8, 13(1)(A), 13(1)(D) and 13(2) of the Prevention of Corruption Act.

The facts of the complaint of the complainant are under:

1 The complainant is a resident of village Bhagal, Taluka: Palanpur District: Banaskantha and we are residing at our native with my family. The complainant is doing business in Gujarat and outside the Gujarat of trading in fish and also doing business of running a hotel. The complainant is doing the business of fish thus getting the dam, lake or pond on lease and purchasing fishes from the contractor who are breeding the fishes, he was selling and in some of cases, he was getting lake on rent from Gram Panchayat etc and during the year 2007-08, the complainant came to know that by issuing tenders, Gujarat Government will give these dams for fisheries and as I am connected with this business, I thought that I will take part in this tender and these dams will be availed to me through tender but in the month of July 2008, I came to know from my personal source that the Minister of Fishers Industry of the Gujarat Government Shri Pursuhottambhai Odhavji Solanki-accused of this case has given these dams to his henchmen and other some Persons by getting illegal financial benefits means getting illegal gratification without calling tenders and going against the policy of the government to give on rent the dams as per the rules and regulations of the government in his own way and while making inquiry thereof the complainant came to know that by abusing and misusing his post, without calling for the tenders and going against the policy of the Government, by receiving and obtaining illegal gratification, the accused has given such contracts to 11 Parties and thereafter in the August 2008, other 47 fishing contractual agreement regarding fisheries to various other parties without issuing tender by taking bribe.

2 The complainant came to know that the accused of this case is a Minister for the State of the Gujarat. He used to call parties interested in the agreement of fisheries in government at his office ponds/dams personally located at Gandhinagar as well as residence and fixed the conditions of agreement as per his own and taking money from the concerned parties, without calling the tenders and. Given. Contracts than the price on the less price mentioned in the tenders issued during earlier years. The complainant came to know that the accused of this case got bribe of more than Rs. 11 crores 58 ponds have been given on lease for 10 years in very less price and as like that, the present accused has made misuse of his post and without initiating legal procedure, doing against rules and well as standard of the regulation as government, by his own, acting like such are in his own government ponds ownership, getting huge amount from the various parties as bribe, given such contracts on very less price than the amount mentioned in earlier old tenders. As per the principles established in various judgments of the Hon'ble Supreme Court and as per established policy and principles of the Central and State Government dated 25.02.2004 and 10.02.2005, calling the tenders for giving the properties of public ownership on contract, such contract is to be given to the higher' bidder in 'the auction or who has given higher amount tender and as a public servant, the present accused is bound to fellow such policy though with an intention to get personal benefit, with a malafide intention, getting gainful benefits from various persons, in collusion with his henchmen, other Ministers and officers, unauthorizedly and frivously given contract of fishing to their persons. At various times, the accused of this case has received gainful benefit from various persons and given 58 fishing contract illegally. As a public servant, the accused of this case is habitual to get such gainful benefits. Thus, by this manner, the accused of this case has intentionally received gainful benefit from various persons and in collusion 'to each other, has misused his power and post being a public servant and has given fishing contract on private way thus, he has

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committed the provisions offence punishable under of Prevention of Anti corruption Act and by doing so, he has caused damages of crores of rupees to the treasury of the Government as well as government also and because of such criminal act of the accused, the complaint is deprived from getting contract of ponds and therefore, the complainant filed Special Civil Application No. 9958/2009 before the Hon'ble Gujarat High Court and requested to cancel the fishing contract given by the accused by illegal manner wherein vide order 29.09.2008, Hon'ble Gujarat High Court quashed all such lease contracts regarding fisheries industry which was given by the accused in illegal manner and passed order to issue tenders as per resolution dated 25.02.2004 and thereafter, give the ponds on lease. In its order, the Hon'ble Gujarat High Court has concluded that such contracts were given with extraneous consideration.

3 After the order dated 29.09.2008 Of the Hon'ble Gujarat High Court, by issuing public notice in the newspaper, issuing tenders, initiating legal procedure afresh, the tenders were called for giving such ponds on lease and thereby, such ponds were given on lease by initiating legal tender procedure. While counting difference between the price of lease of ponds which were given earlier by the accused and which were given after the order of Hon'ble Gujarat High Court, initiating tender procedure, the difference comes to Rs. 44 crores of one year and and the contracts which were given by the accused were of 10 years, therefore, such difference reaches more than Rs. 400 crores. As per the order of the Hon'ble Gujarat High Court, the tender procedure was initiated afresh and the contracts given by the accused of this case earlier by illegal manner were quashed thus while making inquiry 0f the parties to whom the accused had given contract by illegal manner, the complainant came to know that in the month of July-August 2008 the accused had given contract by illegal manner after getting huge amount from the concerned Party as bribe and by that way, he has committed scam of more than Rs. 400/- crores. But,

the accused of this case is the State level Minister and headstrong person and it came to know no one have courage to speak against him and therefore, the complainant was intending to lodge complaint against the accused of this case but at that time, as per the provisions of Prevention of Anticorruption Act 1988, permission was required to lodge complaint therefore, the complainant did seek permission from the Chief Secretary, Gujarat Government by way of letter dated 02.12.2009 to lodge complaint against the accused of this case under Section 19, but complainant did not get any reply thereof therefore, the complainant filed Special Criminal Application No. 2226/2010 before the Hon'ble Gujarat High Court and vide order dated 30.03.2012, the Hon'ble Gujarat High Court quashed the order dated 20.10.2010 of the Deputy Secretary who has rejected the application dated 02.11.2009 of the complainant and directed to take decision a fresh on the application of the complainant. Hon'ble Gujarat High Court observed in its order dated 30.03.2012 even the method of the accused for giving contracts without tender by the concerned officers was objected though the contracts were given without issuing tender. But, thereafter, as per order of the Hon'ble Gujarat High Court, no order was passed thus, the complainant filed Contempt petition being MCA No. 1745/2012 before the Hon'ble Gujarat High Court but, thereafter, vide order dated 26.07.2012, the application dated 02.12.2009 was allowed and granted permission to file complaint against the accused of this and such kind of information was given by the Government to the complainant vide letter dated 30.07.2012 ad on the basis of the order dated 26.07.2012 passed by the Government to lodge complaint against. The accused, the complainant has filed this complaint before this Hon'ble Court.

4 By misusing the post, the accused of this case received huge amount from various parties as bribe, thereby indulging corruption of more than Rs. 400 crores. The accused has committed offence punishable under

Sections 7, 8, 13(1)(A), 13(1)(D) and 13(2) of the Prevention of Corruption Act thus, kindly arrest the accused of this case and conduct the case and after proving the offence, kindly punish him."

7 It appears that on filing of the complaint, the Special Judge recorded the verification of the complainant on oath and thereby took cognizance of the alleged offence. The verification of the complainant recorded on oath by the learned Special Judge reads thus:

"1 I state on solemn affirmation that I am residing at village Bhagal, Taluka: Palanpur and doing business of fisheries and having hotel. I was having interest in fishing contract and in the daily news any tender was not paper of June 2008, published regarding fishing contract and while making inquiry from the Fisheries Industry office, Old Sachivalaya, issued by Gandhinagar that tenders are renewing the same.

2 Thus, I got nformation from the office of Fish Industry, Old Sachivalaya regarding tender and came to know that the lake and ponds of having area 200 hectare have been given on contract to their henchmen. Thus, I though that in the government, the work has been made without tender and the government has suffered economic loss and therefore, I issued notice through my advocate stating that "after receipt of this notice, the notice receiving shall have to initiate procedure of giving contract of such ponds as per the contract policy dated 25.02.2004 and further stated that my client is intending to fill up the tender regarding Dantiwada Dam in sum of Rs. 7,00,000/- Rupees Seven Lacs per year and Sipu dam in sum of Rs. 4,00,000/- Rupees Four lacs only and if the procedure of giving contract is not initiated as per the contract policy provisions and if you fail to dos then you will cause damages of huge amount of income to the Gujarat Government and my client is constrained to initiate legal procedure against you before the Hon'ble Gujarat High Court or any other Court.

Note: At this stage, the complainant has a Ramjan Roja (religious day) thus he granted permission to leave Roja and he has to leave roja after praying Namaj thus permission is granted and permission is granted to record his further statement thereafter. 3. The complainant remained present after leaving Roja thus by giving him oath, the further statement has been recorded and thereafter, I filed case before the Hon'ble High Court and copy of such judgments are produced in this case vide Mark 3/1, 3/2, 3/4 and 3/5 and in this regard, I sought permission of prosecution on

02.12.2009 and copy thereof is produced vide mark 3/3 and zerox copy of the affidavit of Pagi Jeraji Monaji dated 24.11.2009 is produced in this case vido mark 3/6.

4 Policy regarding the contract of dams to be given to the Fisheries Industries are produced vide mark 3/7 and 3/8. Copy Of the statement showing one year difference regarding upper price 28 dams is produced vide mark 3/9.

5 In this case, the Hon'ble Governor of the Gujarat State has granted permission for prosecution of the complaint under the provisions of Prevention of Anti Corruption..Act 26.07.2012 and in this regard, the General Administrative Department, Sachivalaya, Gandhinagar has informed us in writing on 30.07.2012 and copy thereof is produced in this case vide mark 3/10.

6 In this connection, today, I have lodged complaint for the offence 8, 13(1)(A), punishable under Section 7, 13(1)(D) and 13(2) of the Prevention of Anti Corruption Act against the accusedPurushottambhai Odhavji Solanki, Mirakunj Talaja Jakat Naka, City Farti Sadak, Bhavnagar.

7 The accused of this case is rendering his service as Fish Industries Minister of the Gujarat Government and is a public complaint is lodged servant and this against him and the document mark 6/1 is the copy of the notice which I mentioned support of nu! Complaint, I have produced the affidavit vide ex. 4.

8 Any original order or copy thereof dated 26.07.2012 passed by the Hon'ble Governor dated 30.07.2012 mentioned in mark 3/10 is not received by me till today and therefore, in support of my complaint, today, I have given this verification on oath."

8 It further appears that thereafter, the Special Judge thought fit to pass an order of inquiry under Section 202 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), through the District Superintendent of Police, Gandhinagar in accordance with the provisions of Section 17 of the Act, 1988. The order reads thus:

"Order below verification of complaint of the complainant Ishakbhai Mahamadbhai Maradiya.

1 I have considered the complaint of the complainant, documents produced vide list Ex. 3 and Ex. 6 in support of the complaint and the facts of the complaint ex. 1 and facts mentioned in the affidavit Ex. 4 and the verification on oath of the complainant below the complaint has been recorded in presence of the learned advocate in the open court and while seeing it, the below mentioned order is passed:

0 R D E R

This complaint is ordered to be registered as Inquiry case number.

Under the provisions of Section 202 of the Code of Criminal Procedure, this inquiry case is ordered to be handed over to the District Police Superintendent, Gandhinagar to make investigation under Section 17 of the Prevention of the Corruption Act. The report of this investigation is ordered to be produced till 6th October, 2012."

9 It also appears that the Inquiry Officer prayed for some more time to file the inquiry report, as directed by the Special Judge. Upon such application filed by the Inquiry Officer, the following order was passed on 5th January 2013:

"[1] The S.P. Gandhinagar who is present today and he has submitted his report and asked for further four months time to comply the order which was passed on 03-08-2012 & 06-10-2012.

[2] The learned advocate for the complainant has objected the same in writing that the order of this Court is not complied by the S.P. Gandhinagar and he also submitted that the Hon'ble High Court has decided Special Criminal Application No.2302 of 2012 on 20-09-2012 and now the process be issued in the present matter, and/or the case be

handed over to C.B.I. to conduct investigation. The learned advocate for the complainant has produced order of the Hon'ble High Court with the list Exh.10 to support his case.

[3] It has found that order of this Court dated 03-08-2012 is challenged before the Hon'ble High Court bearing Special Criminal Application No.2391 of 2012 on 14-08-2012. The Hon'ble High Court has issued the notice returnable on 27-08-2012 by order dated 16-08-2012. The status of the said matter appeared in website of the Hon'ble High Court as on today the next listing date of Special Criminal Application No.2391 of 2012 on 21-01-2013 for hearing. The status and order of the Hon'ble High Court is at Exh. 11 & 12.

[4] The order passed by this Court on 03-08-2012. Thereafter. The S.P. Gandhinagar has requested on 06-10-2012 by submitting his report Exh.7 and asked further time for 90 days and this Court has granted time up to 05-01-2013 and Yadi was sent to S.P. Gandhinagar. The office copy is at Exh.8. Thereafter, today S.P. Gandhinagar has filed his report with request to grant four months time on various reasons that earlier, he was busy in election of Legislative Assembly of Gujarat State and thereafter, he was on leave from 24-12-2012 to 28-12-2012 and thereafter, from 08-01-2013 he would be busy for at least two months on various reasons and he seeks time for four' months.

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[5] It has found that the complaint was filed by the complainant on 03-08-2012 and thereafter, the time was sought by S.P. Gandhinagar on various reasons. It has found that the order of this Court dated 03-08-2012 is under challenged before the Hon'ble High Court of Gujarat and the notice was issued to the State and to the complainant and the matter is pending before the Hon'ble High Court of Gujarat and next listing date is fixed on 21-01-2013. In that view of the matter, this matter is required to

be adjourned as to day the complainant has made submission to issue process and/or to transfer the investigation to C.B.I. and when two prayers are made and in that view of the matter the present matter is required to be adjourned on 2nd February, 2013 and in the mean time, the SP. Gandhinagar is directed to submit his progress report on oath to decide the matter in the interest of justice on 02-02-2013.

[6] Yadi be sent to S.P. Gandhinagar for further compliance as stated above."

10 Thereafter, one another order came to be passed on 7th March 2013, which reads thus:

"[1] The complaint was filed by the complainant on 03-08-2012. The investigation was handed over u/s 202 of Criminal Procedure Code to S.P. Gandhinagar by order dated 03-08-2012. It has found that the said order was challenged before the Hon'ble High Court of Gujarat bearing Special Criminal Application No.2391 of 2012 on 14-08-2012. The Hon'ble High Court of Gujarat has issued notices returnable on 27-08-2012. The status of the said matter appeared in Website of the Hon'ble High Court of Gujarat as on to day and the next hearing is scheduled on 22-03-2013, in the mean time, the S.P. Gandhinagar has investigated the matter as per the order of this Court u/s 202 of Criminal Procedure Code. The time was sought for by the SP. Gandhinagar on several occasions and lastly on 25-02-2013 the time was sought for three months on various reasons.

[2] The earlier applications were given at Exh.7, 9 & 13 on 06-10-2012, 05-01-2013 and 02-02-2013 and lastly at Exh.17 on 25-02-2013. The objection filed by the complainant at Exh.15 and thereafter, the complainant has resisted on several grounds which are stated in his objection at Exh.15. The complainant agitated that in fact, there is no

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effectively progress of the investigation by the S.P. Gandhinagar and requested Hon'ble High Court of Gujarat that no further extension should be granted and requested to issue process to the accused or entrusted further inquiry with an impartial Agency like C.B.l.

[3] The S.P. Gandhinagar has investigated till to day and it has found that the various documents were not received from the various Agency of Government and he is busy in various duties which are entrusted to him by the State and it has found that much more investigation is still pending and the matter is pending before the Hon'ble High Court of Gujarat. The P.I. L.I.B. was also included still the investigation is under progress at the earliest and in these circumstances, more time is also required for the investigation of this case and for that circumstances, the time is hereby extended up to 10-05-2013. The detailed report be submitted on oath.

[4] The matter is stand over to 10-05-2013."

11 On 20th May 2013, the following order came to be passed:

"(1) The complainant's Adv. Mr. V.J. Thakor, Mr. A.V Rathod and Ld. Adv. Mr. Mukul Sinha were present on 15/05/2013. The report dated 10/05/13 at Exhibit - 21 submitted by the Superintendent of Police, Gandhinagar has been read and considered. The prosecution has strongly objected against the demand made on 15/05/2013 for extension of time by the Superintend of Police Gandhinagar with Exhibit-21 and it has been submitted that, the complaint of this case has been registered on 03/08/12 and the sanction has been granted on 03/07/12. Thereafter, the present complaint has been registered. Therefore, it has been submitted that, the process shall be issued under the provisions of the Prevention of Corruption Act in this case. Much time has passed after assignment of investigation to the S.P., Gandhinagar u/s 202 of Cr.P.C. and the progress

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in the investigation is very slow. In such circumstances, processes shall be issued against the accused or the investigation in this regard shall be handed over to any other agency.

(2) The complainant has filed his complaint on 03/08/2012. The sanction for prosecution has been granted on 30/07/2012. It has been produced with Mark – 3/10. Prosecution has produced various judgments of Hon'ble Gujarat High Court with Mark – 3/1, Mark – 3/2, Mark – 3/4, Mark – 3/5 and Mark – 10/1. On 03/08/12, SP, Gandhinagar has been handed over the investigation of this case u/s 202 of Cr.P.C. Thereafter, SP, Gandhinagar has submitted his reports with Exhibits – 7, 9, 13, 17 and 21 till 10/05/2013 in which the statements of some of the witnesses have been recorded. But it has been mainly submitted by him that, out of five Dy. S.Ps in Gandhinagar district, two are present and the remaining three posts are vacant. As Gandhinagar is the capital city of the State of Gujarat, he cannot leave the Gandhinagar headquarters due to the security reasons. Moreover, as he has to handle the said investigation apart from his daily duties of maintaining law and orders, he can go out of station maximum once in a week and investigate two witnesses. As all the witnesses reside in the villages of different districts of Gujarat, time of 90 days has been demanded for the further investigation.

(3) The investigation in this case has been carried out at a very low pace because the Superintendent of Police was working in his office at Gandhinagar Head Quarter and was engaged in an important bandobast, security and protection at various stages of investigation since 3/8/2012 till today for various reasons and statements of only a few witnesses have been recorded. In view of such circumstances, this Court has passed an order dated 3/8/2012 in this case. Against the said order, Special Criminal Application No. 2391/2012 has been filed on 14/8/2012 in the Hon'ble Gujarat High Court, wherein an order for notice has been passed, which is given Exhibit-22 in this case. Such fact transpires on seeing the

status of this petition from the website of Hon'ble Gujarat High Court, wherein next date of adjournment has been fixed on 25/6/2013. On frequently seeing the status of the said petition from the computer, the next date of adjournment has been fixed by the Hon'ble High Court in the said matter. An attempt has been made to obtain such information and for any order passed in the said matter, but it is necessary to note here that the said matter is still pending before the Hon'ble Gujarat High Court till today.

(4) In this case, the Superintendent of Police, Gandhinagar was ordered to conduct inquiry under Section 202 of the Cr.P.C. Thereafter, various reports vide Exhibit-7, Exhibit-13, Exhibit-17 and Exhibit-21 were submitted by the Superintendent of Police, Gandhinagar and in this regard, this Court has passed orders dated 5/1/2013 and 7/3/2013 below Exhibit-1. Thereafter, the Superintendent of Police, Gandhinagar has submitted his report lastly on 10/5/2013 in connection with the orders passed below Exhibit-1, wherein he has sought extension of additional time of 90 days for investigation.

(5) As per the provisions of the Prevention of Corruption Act, complaint was registered. The sanction of prosecution has been granted on 30/07/12 in this regard. The same is produced vide mark 3/10. Looking at the same, as time for further investigation was not granted to the Superintendent of Police of Gandhinagar, it is ordered to relieve him from the investigation. As per the complaint, as offence was committed in accordance with the provisions of prevention of corruption act, it appears to be necessary to order to hand over investigation of offence to Anti Corruption Bureau, Government of Gujarat. Therefore, as per the provision of section 202 of Cr.P.C., its investigation and judicial process can be conducted. Therefore, following order is passed.

:: O R D E R ::

The Superintendent of Police, Gandhinagar is relieved from investigation in connection with Criminal Inquiry Case No. 1/2012 of Gandhinagar. It is hereby ordered to hand over all the original papers of the investigation including all the records such as case diary, etc. to the Anti Corruption Bureau, Government of Gujarat, in the sealed condition.

The Chief Police Officer and the Director, Anti-Corruption Bureau, Government of Gujarat, after consulting the Special Director/Additional Director/Joint Director under his administrative control and the Assistant Director of Ahmedabad Unit, Mehsana Unit, Vadodara Unit, Surat Unit, Rajkot Unit and Junagadh Unit under administrative control of the Anti Corruption Bureau should get investigation of the said complaint conducted by various officers above the rank of Police Inspector. The Anti Corruption Bureau, Government of Gujarat, Gandhinagar should submit report thereof in this court by 29/11/2013 u/s 173 of the Cr.P.C.

The yaadi of this order be forwarded to the Superintendent of Police, Gandhinagar and Chief Police Officer and Director, Anti-Corruption Bureau, Government of Gujarat."

12 Finally, upon receipt of the report of inquiry, the Special Judge thought fit to issue process against the accused persons under Sections 7, 8, 13(1)(a) and 13(1)(d) read with Section 13(2) of the Act, 1988. The order below Exhibit : 1 in the Criminal Inquiry No.1 of 2012 reads thus:

"0n perusal of complaint documents produced alongwith complaint as well as police report dated 31.05.2014 Exh.29 and Police report dated 23.06.2015 Exh.42, it appears that there is sufficient ground for proceeding. Therefore, Registry, Criminal Branch is directed to register this case and issue process against the Accused No.1 to 7 U/s. 7, 8, 13(1)(A),

13(1)(D), 13(2) of Prevention of Corruption Act, 1988."

13 It appears from the above that although the complaint was lodged only against the writ applicant herein, yet as the inquiry ordered by the learned Special Judge revealed the involvement of other persons too, which includes the writ applicant of the Special Criminal Application No.5338 of 2015, the process came to be issued to in all seven accused persons.

14 The Criminal Inquiry No.1 of 2012, ultimately, culminated in the Special Case (ACB) No.4 of 2015. The order in this regards reads thus:

> *"In view of Order below Exh. 1 dated : 12/08/2015 passed by the Additional District Judge, Gandhinagar in Criminal Inquiry No.1 of 2012, this case is registered as Special Case (A.CB) No.4, 2015 and transferred to the Additional District Judge, Gandhinagar for hearing and disposal according to law."*

15 At this stage, I take notice of one order passed by a Division Bench of this Court in the Miscellaneous Civil Application (for contempt) No.1745 of 2012 dated 30th July 2012. The order reads thus:

1. *"The basis of present petition for initiation of action under the Contempt of Courts Act is alleged breach and non-compliance of the order dated 30.03.2012, passed by learned Single Judge of this Court in Special Criminal Application No.2226 of 2010, whereby, after quashing of the order dated 20.10.2010, which was subject matter of the challenge in the said Special Criminal Application, this Court has restored the file with the application dated 02.12.2009 and it was directed to be decided afresh in accordance with law. While issuing said direction, it was further observed observed that while considering the issue regarding grant or refusal of the sanction, the State Government shall also keep in mind the guidelines issued by the Supreme Court in case of* ***Subramanian Swamy Vs. Manmohan Singh*** *reported in* ***(2012) 3 SCC 64*** *as well as the principles laid down by the Supreme Court in case of* ***M.P.Special Police***

Establishment Vs. State of M.P. And others *reported in* ***(2004)8 SCC 788****.*

2. *It appears that as per the applicant aforesaid directions were not complied with and therefore, present application was preferred for initiation of action under the Contempts of Courts Act.*

3. *When the matter was heard on 06.07.2012 for the first time, following order was passed:-*

    1. *"We have heard Mr.Sinha, learned Counsel appearing for the petitioner and Mr.Kamal Trivedi, learned Advocate General appearing with Mr.P.K. Jani, learned Government Pleader for the Chief Secretary upon advance copy.*

    2. *We may also record that during the course of the hearing the original file of the proceedings of the Council of Ministers was made available to the Court for perusal.*

    3. *The grievance on the part of the petitioner is that as per the decision of this Court dated 30.3.2012 in Special Criminal Application No.2226 of 2010, the competent authority to grant sanction or otherwise is 'The Governor' and the Council of Ministers could not have taken final decision.*

    4. *Whereas the learned Advocate General made a statement on behalf of the the State Government that the decision is taken by the Council of Ministers and as per the convention, the intimation is also sent to Her Excellency the Governor.*

    5. *We may record that as per the decision of this Court, which is the basis of the present proceedings, at paragraphs 34 (3), (4), and (5), it has been observed as under:-*

        "34. (1) xxx

        (2) xxx

        (3) In the case of a Chief Minister or a Minister, be he, a Cabinet Minister or a Minister of State, the expression "State Government" in section 19 of the Prevention of Corruption Act, 1988 would mean "the Governor".

        (4) However, unless a situation arises as a result whereof the Council of Ministers disables or disentitles itself, the Governor in such matters

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may not have any role to play. It is the Council of Ministers who has to first consider grant of sanction.

*(5) As observed by the Supreme Court in **M.P. Special Police Establishment vs. State of M.P. and others** (supra) a high authority like the Council of Ministers will normally act in a bonafide manner, fairly, honestly and in accordance with law. However, on those rare occasions, where on facts, the bias becomes apparent and/or the decision of the Council of Ministers is shown to be irrelevant and based on non-consideration of relevant factors, the Governor would be right on the facts of the case to act in his own discretion and grant sanction."*

5. *Therefore, for proper implementation of the order two steps were to be taken; one was the decision of the Council of Ministers and another was to forward the matter to 'the Governor' for her final approval or otherwise. It does appear that the Council of Ministers has taken decision on 27.6.2012 expressing the view that the sanction does not deserve to be granted. Under these circumstances, as the Council of Ministers has already taken decision, it can be said that the order is implemented by the Council of Ministers to that extent. Hence, we are of the view that no proceedings deserve to be initiated against Respondents No.1 to 8.*

6. *But it would be required for the Chief Secretary of the State Government to forward all the papers to 'the Governor' with the decision of the Council of Ministers for approval or otherwise and to take decision as per the decision of this Court in Special Criminal Application No.2226 of 2010.*

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7. *At this stage, learned Advocate General states that the Chief Secretary of the State Government shall forward such proposal within a period of one week from today to Her Excellency the Governor for approval or otherwise and for appropriate decision. It is also observed that we expect that appropriate decision shall be taken within two weeks thereafter.*

8. *Hence, Respondents No.1 to 8 shall stand deleted at this stage. No formal notice is issued to Respondent No.9 (now only Respondent), since the learned Advocate General has appeared on behalf of him (the Chief Secretary of the Gujarat State – Respondent).*

*9. **S.O. to 30.7.2012** for reporting further progress of the matter."*

4. Thereafter, the the Registrar General of this Court has received the order dated 26.07.2012 passed by the Governor of Gujarat. The operative part at Paragraph No.65 reads as under:-

> *"The application of Shri Maradia dated 02.12.2009 is required to be allowed and is hereby accordingly allowed and sanction under Section 19 of the Prevention of Corruption Act is hereby granted for prosecution of Shri Purushottam Solanki, Minister of State for Fisheries under Sections 7, 8, 13(1)(a), 13(1)(d punishable under section 13(2) of the Prevention of Corruption Act, 1988 in respect of the allegations contained in the application of the applicant Shri Ishakbhai Maradia dated 02.12.2009)"*

5. We may also record that aforesaid order is forwarded by the Under Secretary of the Governor of Gujarat to the Registrar General of this Court vide letter dated 27.07.2012. We may also record that learned Advocate General Mr.Trivedi has also confirmed the position of the order having been passed by the Governor of Gujarat for grant of the sanction for prosecution.

6. The aforesaid leads two situation; one is consideration of the application for grant of the sanction for prosecution against the Minister concerned by the Council of Ministers of the State Government and thereafter, the final decision by the Governor of Gujarat.

7. In our view as the order passed by the learned Single Judge has been complied with, which is the basis of present proceedings, the present proceedings is not required to be continued further. Hence, disposed of accordingly."

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16 The aforesaid order makes it clear that the State Government accorded sanction under Section 19 of the Prevention of Corruption Act to prosecute the writ applicant – the Minister of State for fisheries for the offences enumerated above of the Act, 1988. It is only after the grant of sanction under Section 19 of the Act, 1988 that the respondent No.2 herein – original complainant filed the complaint, as referred to above.

17 The writ applicant, being aggrieved and dissatisfied with the order of the Special Judge taking cognizance of the offence and issuing process, has come up with this writ application under Article 226 of the Constitution of India.

● **SUBMISSIONS ON BEHALF OF THE WRIT APPLICANT:**

18 Mr. Virat Popat, the learned counsel appearing for the writ applicant has raised the following grounds of challenge to the order of issue of process:

> *"[A] That the impugned order of issuing process is abuse of process of law and therefore it is submitted that the impugned order be quashed and set aside.*
>
> *[B] The petitioner humbly says and submits that the petitioner had worked as public servant with bonafide intention. The petitioner had not committed offences as alleged in the complaint.*
>
> *[C] The petitioner humbly says and submits that the investigation officer had submitted his report wherein nowhere it is stated that the petitioner had took bribe from anyone. That the investigation officer had not mentioned that any offence as alleged by the complainant had ever been committed by the petitioner.*
>
> *[D] It is submitted that the investigation agency had completed investigation wherein it is clearly stated that the petitioner and other officers concern had done their work honestly.*
>
> *[E] The petitioner submits that the petitioner is responsible citizen of this country and coming from reputed family. That the petitioner is permanent resident of Bhavnagar, and, having reputation in society at large.*
>
> *[F] The petitioner most humbly submit that the investigation report is very clear and investigation officer had not mentioned in his report that petitioner had committed any offence as alleged by the complainant.*

[G] That the allegations in the impugned complaint are so absurd and inherently improbable that on the basis of which no prudent person can ever reach to a conclusion that any cognizable offence has been made out. Therefore the investigation officer submitted his report that no offence as alleged is committed by the petitioner. It is respectfully submitted that if the Hon'ble Special Court is accepting the report than the complaint should. Be dismissed. It is respectfully submitted that is the Hon'ble Special Court on accepting report cannot issue process against anyone. The order of issuing process is illegal and passed mechanically without applying judicial therefore is prayed that the impugned order of issuing process and further proceedings on basis of the said order be quashed and set aside.

[H] That the impugned complaint was filed with malafide intention to harass the present petitioner and therefore also, it is submitted that the impugned complaint be quashed and set aside.

[I] The petitioner submits that even if the allegations in 'the complaint and thereafter investigation report are taken at its face value then also no cognizable offence against the present petitioner is disclosed. Therefore also, it is submitted that the proceedings of special case arose by order of issuing process be quashed.

[J] That the impugned order of issuing process is sheer abuse of process of law and therefore also, it is submitted that the impugned order of process and further proceedings of special case be quashed and set aside."

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19 Mr. Popat submitted that the Special Judge committed an error in taking cognizance of the offence upon a private complaint filed by the respondent No.2 herein, without asking or directing the complainant to produce his witnesses. To put it in other words, the submission of the learned counsel proceeds on the footing that solely relying upon the verification of the complaint, through the complainant on oath, the Special Judge could not have taken cognizance and the Special Judge ought to have asked the complainant to produce and examine the witnesses in respect of the allegations levelled in the complaint.

20 Mr. Popat further submitted that there is absolutely no case worth the name for the purpose of prosecuting his client for the alleged offence. He would submit that the Special Judge committed a serious error in issuing process by relying upon the inquiry report. Mr. Popat would submit that the entire prosecution against his client is vexatious and frivolous. The frivolous prosecution has tarnished the image of his client and has caused a social stigma. He would submit that his client is leading a very honest and active public life and is also a sitting Minister in the State of Gujarat. He pointed out that his client has been the member of the Gujarat Legislative Assembly for almost more than twenty years.

21 In such circumstances referred to above, Mr. Popat, the learned counsel prays that there being merit in this petition, the same be allowed and the order of process be quashed.

- **SUBMISSIONS ON BEHALF OF THE WRIT APPLICANT OF THE SPECIAL CRIMINAL APPLICATION NO.57338 OF 2015:**

22 Mr. Tanna, the learned senior counsel appearing for the writ applicant vehemently submitted that the Special Judge committed a serious error in issuing process to his client for the alleged offence. According to Mr. Tanna, his client has nothing to do with the prosecution of *Solanki*. The principal argument of Mr. Tanna is that as his client has not even been named in the complaint, the Special Judge could not have taken cognizance and issued process to his client. Mr. Tanna would submit that there is no material worth the name on record to even remotely indicate any involvement of his client in the alleged offence. Mr. Tanna heavily relied upon the inquiry report and submitted that inquiry report nowhere reveals any involvement of his client in the alleged offence. Mr. Tanna submitted that if an officer has been directed

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to undertake inquiry under Section 202 of the Cr.P.C., then the inquiry should be confined only as regards the allegations levelled against the person named in the complaint as an accused. According to the learned senior counsel, the inquiry officer in its inquiry report could not have added other persons as accused alleged to have been involved in the offence.

23 In such circumstances referred to above, Mr. Tanna, the learned senior counsel prays that there being merit in his petition, the same be allowed and the proceedings of the Special Case No.4 of 2015 be quashed so far as his client is concerned.

- **SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2 – ORIGINAL COMPLAINANT:**

24 Mr. M.C. Bhatt, the learned counsel appearing for the original complainant has vehemently opposed all the three petitions. Mr. Bhatt would submit that no error, not to speak of any error of law could be said to have been committed by the Special Judge in taking cognizance and issued process to the accused persons. Mr. Bhatt submitted that the prosecution instituted against the accused persons is very serious. He would submit that the case involves large scale corruption in floating of the tenders and contracts. The case involves grant of fishing lease to private individuals without following any procedure of tender, etc. The case is one of a huge scam. Mr. Bhatt submitted that the State Government has accorded sanction under Section 19 of the Act to prosecute the main accused and that by itself indicates that there is more than a *prima facie* case against the accused persons.

25 Mr. Bhatt invited the attention of this Court to one order passed

by a Division Bench of this Court dated 29th September 2008 in the Special Civil Application No.9958 of 2008 with Special Civil Application No.1098 of 2008. The two petitions were filed by the respondent No.2 herein challenging the action of the State Government in awarding fishing contract in the reservoirs of the State of Gujarat to certain cooperative societies. The order reads thus:

> *"These two petitions are filed under Article 226 of the Constitution to challenge the action of the State Government in awarding fishing contracts in the reservoirs of the State of Gujarat to certain cooperative societies the respondents herein.*
>
> *It is the claim of the petitioners that the impugned contracts have been awarded to the concerned societies in contravention of the state policy contained in the Government Resolution dated 25th February, 2004, and are given for extraneous reasons. The Government Resolution dated 25th February, 2004 sets out state policy in respect of grant of lease license for fishing in reservoirs of the State of Gujarat. It provides for period of lease; classification of reservoirs; lease & license; reservoirs which can be granted at the upset price, etc. It sets out separate policy for the reservoirs in the tribal areas and the reservoirs other than in the tribal areas. The authority which is empowered to grant such lease.*
>
> *In the present group of petitions, we are concerned with the reservoirs situated in areas other than tribal areas and have surface area of more than 200 hectares. The state policy in respect of such reservoirs is spelt out in Part-B of the Resolution. It states that,* ***..All reservoirs of areas above 200 hectares, which are in non-tribal areas shall be given to those who will pay highest price by tender system.*** *It also provides for relief upto 20 per cent to the society of fishermen living below the poverty line and for priority to the registered fisheries co-operatives/unions having all the local members. Nevertheless, in that case also, it has to be granted by tender process. It also gives directions with respect to publication of advertisement in daily newspapers. Paragraph 4 thereof provides for fixing the upset price on the basis of the effective water areas.*
>
> *It is not in dispute that the disputed contracts are awarded in respect of the reservoirs having are of more than 200 hectares without following the tender process. It is also not disputable that the sanction for such contracts is granted not by the authority mentioned in the Resolution dated 25th February, 2004 but at the instance of the concerned minister. In fact, by general instructions issued on 5th February, 2008, the fishing lease in respect of several reservoirs all over the State of Gujarat has been awarded*

to the concerned societies, as is reflected from the said instructions.

Learned advocate Mr. Sinha has appeared for the petitioners. The main thrust is that the concerned contracts have been granted on extraneous reasons at the upset price which is less than the previous period. The concerned cooperative societies are obviously favoured.

The petition is contested by the State of Gujarat. The sum and substance of the defense is that the cooperative societies which have been granted the concerned contracts belong to very poor fishermen and fishing is their only livelihood. With a view to providing them occupation, the disputed contracts are awarded. In respect of the contracts for fishing lease granted in respect of Aji Reservoir at Rajkot and Bhadar reservoir, it is stated that the fishermen who are granted these contracts are members of padhar adivasi community. For several years the said community was engaged in fishing at Nal Sarovar. It is stated that fishing at Nal Sarovar has been prohibited by the State Government vide Order dated 28th August, 2001. Because of the said prohibition, the said fishermen have lost their livelihood. Now, with a view to providing them livelihood in the areas where they reside, the above referred lease contracts in respect of Aji reservoir at Rajkot and Bhadar reservoir have been granted to them.

The petitions are contested by the concerned Cooperative Societies. According to them, they had lost their livelihood; they had approached the State Government to provide them fishing contracts and pursuant to their applications, the lease for fishing was granted to them.

As recorded hereinabove, the Government policy contained in the aforesaid Resolution dated 25th February, 2004 provides for grant of fishing lease at upset price in respect of reservoirs having areas less than 200 hectares. It is, therefore, not believable that the respondents-societies ought to be provided livelihood by awarding fishing lease in large reservoirs without the tender process. Evidently, the impugned contracts have been awarded by the State Government, instead of by the competent authority, who, under the Resolution are the District Officers, etc. Obviously, the concerned Minister has usurped the power vested in the competent authority. It is also not demonstrated that the upset price was fixed as set-out in the aforesaid paragraph 4 of the above referred Resolution dated 25th February, 2004. We are, therefore, of the opinion that the impugned contracts of fishing lease have been granted arbitrarily. The concerned respondent-Societies have been shown undue favour for extraneous reasons.

For the aforesaid reasons, both these petitions are allowed. The impugned contracts for fishing lease granted to the concerned societies are quashed with effect from 15th November, 2008.

The respondents-Competent Authorities are directed to grant fishing lease in respect of the concerned reservoirs by tender process as set-out in the Government Resolution dated 25th February, 2004. The respondents-authorities will also refund the amount of security deposit and the proportionate lease amount to the respondents-Societies within fifteen days from the date of termination of the impugned contracts i.e., on or before 2nd December, 2008.

Rule nisi issued in each petition is made absolute with cost.”

26 Mr. Bhatt laid much emphasis on the observations of the Division Bench in the aforesaid order, which reads “obviously, the concerned Minister has usurped the power vested in the competent authority. The concerned respondent – societies have been shown undue favour for extraneous reasons”. Mr. Bhatt, thereafter, invited the attention of this Court to a very exhaustive judgment delivered by a learned Single Judge of this Court dated 20th September 2012 passed in the Special Criminal Application No.2302 of 2012 filed by the writ applicant herein questioning the order dated 26th July 2012 passed by the Governor of Gujarat according sanction under Section 19 of the Cr.P.C. to prosecute the Minister viz. Solanki. The challenge to the order of grant of sanction for prosecution, ultimately, failed with the rejection of the Special Criminal Application No.2302 of 2012 referred to above.

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27 Mr. Bhatt further submitted that for the purpose of taking cognizance and issue of process to an accused, only a *prima facie* case is to be seen. To be precise, the Court should be convinced or satisfied that there are sufficient grounds to proceed against the accused. Mr. Bhatt would submit that the examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint and also those whose

involvement figures later in the course of the inquiry. Mr. Bhatt submitted that the expression "sufficient ground" used in Sections 203, 204 and 209 of the Cr.P.C. means the satisfaction that a *prima facie* case is made out against the accused of committing an offence.

28 Mr. Bhatt took this Court through few relevant findings recorded in the inquiry report, *prima facie,* disclosing the commission of the offence under the Act, 1988. Mr. Bhatt the learned counsel appearing for the original complainant has placed strong reliance on the following averments made in the affidavit-in-reply filed by the respondent No.3 *inter alia* stating as under:

> *"5 It is submitted that the complaint filed by me before the Ld. Special Judge is in respect of a huge scam, of corruption and loss of Crores of rupees to the State Exchequer. The complaint is in respect of offences punishable under Section 7, 8, 13(1)(d), 13(2) of Prevention of Corruption Act, 1988 in which even as per the report submitted by the Investigation Authority after completion of the investigation, 2 Ministers and 5 high ranking officials of the State Government are found to have been involved in the scam of contract for extraneous awarding fisheries consideration and in gross violation of policy of the State Government. The background facts compelling the answering respondent (respondent no.3) to file complaint are as under:*
>
> > *a) 25.2.2004 : The Government of Gujarat has issued circular / policy for awarding the fisheries contract of various government reservoir as per which more particularly Clause 3(b)(3) of the policy the fisheries contract are to be awarded only by inviting tender to the highest bidder. Policy also provides that only Chief Minister can give concession in appropriate case. The said policy is amended by circular dated 25.2.2004 and 10.2.2005, the upset price of the reservoirs mentioned in the policy are also provided.*
> >
> > *b)The answering respondent is engaged in business of fisheries since many years and was aspirant to submit a tender for fisheries contract of government reservoir. However the answering respondent came to know in July 2008 that though there is policy*

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to issue public advertisement to invite tender for awarding fisheries contract, the petitioner herein-Parashottam Odhavjibhai Solanki who was the then Fisheries Minister and who is at present also Fisheries Minister have awarded fisheries contract to different parties at very low price contrary to the policy and by taking gratification and the said minister has awarded 11+47= 58 fisheries contract to different parties for extraneous consideration by misusing and abusing his position as. Minister(public servant). Therefore, the answering respondent filed Special Civil Application No.9958/2008 and Special Civil Application No.10919/2008 before this Honourable Court challenging the decisions of awarding contract to different parties.

c) 29.9.2008 : This Honourable Court (Coram: Honourable Justice Mr. R.M. Doshit and Honourable Justice Mr. Sharad D. Dave JJ. as they were then) by order dated 29.9.2008 allowed the petitions filed by answering respondent and set aside the contracts for fishing lease granted to various parties and further directed to grant the fisheries contract by tender process as per the policy dated 25.2.2004. This Honourable Court also observed in the said order that the contracts were awarded arbitrarily and certain societies were favoured for extraneous consideration. A copy of the order dated 29.2.2008 is annexed herewith and marked as Annexure-R/2.

d) Thereafter the contracts were awarded by tender process to the highest bidder as per the policy o£ the state government because of which very high price could be fetched by the government. The difference of price at which petitioner illegally awarded the contract and the price of the contract awarded by tender process as per the policy is huge difference and runs in crores of rupees, approximately 400 Crores. Thus the State Exchequer was made to suffer loss of Crores of rupees by the petitioner-Minister and others involved in the scam for their personal benefit. Therefore, the complainant-answering respondent wanted to file complaint against the petitioner-Minister.

e) However since the petitioner-Minister was public servant, the complainant submitted application dated 2.12.2009 under Section 19 of Prevention of Corruption Act,1988 to the Chief Secretary of Government of Gujarat and requested to grant the sanction to prosecute the concerned minister. However, since no decision was taken by the government, the complainant filed Special Criminal Application No.38/2010.

f) 4.2.2010 : This Honourable Court (Coram: Honourable Mr. Justice Anant Dave J.) disposed of the said petition with direction to decide the application of the complainant within 8 weeks from the date of the receipt of the order. A copy of the order dated 4.3.2010 is annexed herewith and marked as Annexure-R/3.

g) 20.10.2010: The Deputy Secretary rejected the application of the complainant seeking sanction and thereby refused to grant the sanction to prosecute the petitioner Minister. Therefore the complainant was once again constrained to approach this Honourable Court by way to Special Criminal Application No.2226/2010 to challenge the decisions dated 20.10.2010.

h) 30.3.2012: This Honourable Court (Coram: Honourable Justice Miss Harsha Devani J.) allowed Special Criminal Application No.2226/2010, quashed and set aside the decision data 20.10.2010, restored the application of the complainant and directed to decide the application afresh in accordance with law. A copy of the order dated 30.3.2012 is annexed herewith and marked as Annexure-R/4,

I) 28.6.2012 : In spite of direction of the Honourable Court, Chief Secretary informed the complainant that his application under Section 19 of the Prevention of Corruption Act,1988 to prosecute 2 Ministers has been rejected by Cabinet of the Ministers. Therefore the complainant filed contempt petition being M.C.A for Contempt No.1745/2010 before this Honourable Court.

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j)26.7.2012: During pendency of the. Contempt petition, the Honourable Governor of Gujarat passed order allowing the application of the complainant and granted sanction to the complainant for prosecution of the petitioner-Minister. The said decision was communicated on 30.7.2012. A copy of the sanction order dated 26.7.2012 is annexed herewith and marked as Annexure-R/S.

k) 30.7.2012 : This Honourable Court (Coram : Honourable Mr. Justice Jayant Patel and Honourable Mr. Justice C.L. Soni, JJ.) disposed of contempt petition in view of grant of sanction by the Honourable Governor. A copy of order dated 30.7.2012 is annexed herewith and marked as Annexure-R/6.

l) 3.8.2012 : After the long legal struggle to obtain the sanction, ultimately the complainant filed the complaint bearing Criminal Inquiry Case No.1/2012 in the court of Special Judge (A.C.B), Gandhinagar for the offences punishable under Section 7, 8 ,l3(1)(a), l3(1)(d) and 13(2) of Prevention of Corruption Act, 1988. The Ld. Special Judge by order dated 3.8.2012 directed D.S.P., Gandhinagar to investigate the case as per Section 17 of the Prevention of Corruption Act, 1988 read with Section 202 of the Criminal Procedure Code with further direction to submit report by 6.10.2012. A copy of complaint along with order dated 3.8.2012 is annexed herewith and marked as Annexure-R/7.

20.5.2013 : Since in spite of various extensions of time granted by the Ld. Special Judge, the investigating authority failed to submit report, the Ld. Special Judge by order dated .5.2013 withdrew the investigation from D.S.P, Gandhinagar and anded over .the investigation to D.G.P.(A.C.B), Gujarat with further direction to submit report by 21.11.2013. A copy of order dated 20.5.2013 is annexed herewith and marked as Annexure-R/8.

n) 31.5.2014: Ultimately, after 1 year, the Investigation Authority submitted final report dated 30.5.2014 as per which (page no.330 of report) offence punishable under Section 13(1)(d) and Section 13(2) of the Prevention of Corruption Act, 1988 and Section 107 and Section 116 of the Indian Penal Code is stated to have been disclosed. As per the report during investigation it is also found that in addition to the petitioner-Minister, Shri Dilipbhai Sanghani then Agriculture and Fisheries Minister and 5 high ranking officers mentioned in the report have also been found to be involved in the offences mentioned in the report. Since the report is already on record the same is not reproduced with view to avoid repetition and burden of record.

o) 12.8.2015: In View Of the report, the Ld. Special Judge found sufficient ground for proceeding against all the persons mentioned in the report and therefore by order dated 12.8.2015 issued process against the accused no. 1 to 7. A copy of the order dated 12.8.2015 is annexed herewith and marked as Annexure-R/ 9 .

6 Thus the petitioner and all other persons involved in the scam are politically very powerful and influential persons, the complainant had to undergo a very long struggle even for obtaining the sanction and for filing the complaint. Even during the investigation also Investigation Authority was not doing the investigation properly and submitting report in spite of various extensions granted by the Ld. Special Judge, Gandhinagar and

therefore complainant had to make various requests to the Ld. Special Judge. Ultimately, even Ld. Special Judge passed order to withdrew investigation and handed over the investigation to D.G.P.(A.C.B), Gujarat who ultimately submitted report of 31.5.2014. Thus the complaint was filed on 3.8.2012 and report was submitted on 3.5.2014 approximately after 2 years in the case of scam which took place in the year 2008. Thus, since the powerful and politically influential people were involved the complainant has been facing unsurmoutable difficulty only because complainant has filed complaint to expose the said scam. It is submitted that it is pertinent to note that after the filing of the complaint against petitioner-Minister, 14 false complaints are registered against the complainant and his family members at different police stations for different so called offences. It is submitted that the government machinery appears to have been misused to pressurize the complainant to withdraw the present case. It is therefore submitted that petitioner is not entitled to any relief from this Honourable Court.

7 It is submitted that his is case of a huge scam to make the State Exchequer lose crores of rupees for the personal benefit. It is also the case of abuse and misuse of position by Ministers and high ranking officers (public servant) for their personal benefit at the cost of huge revenue loss to the State Exchequer which is the public money.

8 It is submitted that Ld. Special Judge has followed all the procedures and there is no illegality in the procedure followed by the Ld. Special Judge. The Investigating Authority after making a detailed investigation submitted report running in 399 pages along with documentary evidence which are to be considered and examined during the trial therefore petitioner is not entitled to invoke extra-ordinary power of this Honourable Court under Article 226 of the Constitution of India and Section 482 of the Criminal Procedure Code. These are voluminous records produced by the Investigating Authority along with the report and therefore in view of report and documentary evidence collected and produced by Investigating Authority, the present quashing petition is not maintainable.”

29 In such circumstances referred to above, Mr. Bhatt, the learned counsel appearing for the complainant would pray that there being no merit in any of the petitions, they be rejected.

- **SPECIAL CRIMINAL APPLICATION NO.8971 OF 2017:**

30 This writ application under Article 226 of the Constitution of India has been filed by Shri Solanki with the following prayers:

> *"A. Your Lordship be pleased to admit and allow the Special Criminal Application.*
>
> *B. Your Lordship be pleased 1x3 quash the summons' issued by the Additional Sessions & Special Judge, Gandhinagar in Special Case (ACB) No. 4 of 2015 for giving reply for framing of charges under section 7, 8, 13(1)(A), 13(1)(D) and 13(2) of the Prevention of Corruption Act, 1988.*
>
> *C. Pending admission, hearing and final disposal of the present application Your Lordship may be pleased to stay further proceeding of Special Case(A C: B) No. 4 of 2015 pending before the Additional Sessions & Special Judge, Gandhinagar;*
>
> *D. Pending admission, hearing and final disposal of the present application Your Lordship may be pleased to exempt personal appearance of the petitioner in the proceeding of Special Case(ACB) No. 4 of 2015 pending before the Additional Sessions & Special Judge, Gandhinagar;*
>
> *E. Your Lordship may be pleased to pass such other and further orders which may be deemed fit and proper in the interest of justice."*

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31 It appears that in view of Section 5 of the Act, 1988, the Special Judge has to follow the procedure prescribed by the Code of Criminal Procedure, 1973 (2 of 1974) for the trial of warrant cases by the Magistrates. In such circumstances, the Special Judge has started recording the pre-charge evidence in accordance with the provisions of Section 244 and 245 respectively of the Cr.P.C. For that purpose, the writ applicant came to be summoned. *Prima facie,* it appears that the writ applicant came to be summoned so as to ascertain whether he would like to cross-examine the witnesses who are being examined by the complainant at the pre-charge stage. So far as this writ application is concerned, I see no good reason to entertain the same. If the writ applicant wants to cross-examine the witnesses at the stage of recording

of pre-charge evidence, then it is always open for him to do so. However, the writ applicant cannot assert as a matter of right that till the charge is framed, he should not be asked to appear before the Court. As on date, he is an accused. If he wants exemption from his personal appearance before the Court, he can always move an appropriate application in this regard under the provisions of the Cr.P.C.

● **ANALYSIS:**

32 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is whether the Court below committed any error in issuing process to the writ applicant for the offence punishable under the provisions of the Act, 1988.

33 Before adverting to the rival submissions canvassed on either side, I must look into the position of law insofar as Section 202 of the Cr.P.C. is concerned.

● **SCOPE OF INQUIRY UNDER SECTION 202 OF THE CR.P.C.:**

34 Section 202 of the Cr.P.C. reads as under:

*"202. **Postponement of issue of process.***

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined

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on oath under section 200.

(2) In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant."

35 An inquiry under section 202 of the Code is not in the nature of a trial for there can be in law only one trial in respect of any offence and that a trial can commence only after the process is issued to the accused. Such proceedings are not strictly the proceedings between the complainant and the accused. A person against whom a complaint is filed does not become an accused until it is decided to issue process against him. Even if he participates in the proceedings under section 202 of the Code, he does so, not as an accused, but as a member of the public. The object of the inquiry under section 202 of the Code is the ascertainment of the fact whether the complaint has any valid foundation calling for the issue of process to the person complained against or whether it is a baseless one on which no action need be taken. The section does not require any adjudication to be made about the guilt or otherwise of the person against whom the complaint is preferred. Such a person cannot even be legally called to participate in the proceedings under section 202 of the Code. The nature of these proceedings is fully discussed by the Supreme Court in two of its cases, i.e., (I) **Vadilal Panchal vs. Dattatraya Dulaji Chadigaonker, AIR 1960 SC 1113 and (ii) Chandra Deo Singh vs. Prakash Chandra Bose, AIR 1963 SC 1430,** in which, section 202 of the former Code of Criminal

Procedure arose for consideration. The present section 202, being a substantial reproduction of the former section 202, the observations made by the Supreme Court in the two decisions , referred to above, on the nature of the proceedings under that section would have to be accepted as governing the proceedings under section 202 of the present Code.

36 Even so, two of the modifications made in the present Section 202 (1) deserve attention. In section 202(1) of the old Code where a magistrate decided to postpone the issue of process for compelling the attendance of the person complained against he had to record reasons in writing in support of such decision. That obligation is no longer there under the present section. Secondly, the purpose of holding an inquiry under section 202(1) of the old code was stated to be 'ascertaining the truth or falsehood of the complaint'. Under the new section the inquiry contemplated is for the purpose of deciding whether or not there is sufficient ground for proceeding. The amendment now made brings out clearly the purpose of the inquiry under section 202 even though the words used in the former section had also been understood by the courts in the same way in which the present section is worded. Thus the section has been brought in accord with the language of section 203 which empowers the magistrate to dismiss a complaint if he is of the opinion 'that there is no sufficient ground for proceeding'. The object of the latter change in section 202 is to be found in the 41st Report of the Law Commission which opined thus:

> *"16.9. Section 202 says in terms that the further inquiry or investigation is intended for the purpose of ascertaining the truth or falsehood of the complaint". We consider this inappropriate, as the truth or falsehood of the complaint cannot be determined at that stage; nor is it possible for a magistrate to say that the complaint before him is true when he decides to summon the accused. The real purpose is to ascertain whether grounds*

exist for 'proceeding further", which expression is in fact used in section 203'. We think therefore that the language of section 202 should correspond to the language of section 203, and we have accordingly made suitable verbal alterations." (see S.S. Khanna vs. Chief Secretary, Patna, AIR 1983 SC 595)

37 The scope of the inquiry under section 202 of the Cr.P.C. is extremely limited-limited only to the ascertainment whether or not there is sufficient ground for proceeding (I) on the materials placed by the complainant before the court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. As noted above, it is well settled that in the proceedings under section 202, the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.

38 The Supreme Court, in the case of **Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi & Ors., AIR 1976 SC 1947,** has very succinctly explained the true scope of an inquiry under section 202 of the Cr.P.C. I may quote the relevant observations made by the Supreme Court.

"It is well settled by a long catena of decisions of this Court that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or demerits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one.

In Chandra Deo Singh v. Prokash Chandra Bose(1) this Court had after fully considering the matter observed as follows:

"The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under s. 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-s. (1) of s. 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant (1) (1964)1 S. C. R. 639, 648 127 and the statements made before him by persons examined at the instance of the complainant."

Indicating the scope, ambit of s. 202 of the Code of Criminal Procedure this Court in ***Vadilal Panchal v. Dattatrya Dulaji Ghadigaonker and Another(1)*** *observed as follows:*

> *"Section 202 says that the Magistrate may, if he thinks lit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against and direct an inquiry for the purpose of ascertaining the truth or falsehood of the complaint; in other words, the scope of an inquiry under the section is limited to finding out the truth or falsehood of the complaint in order to determine the question of the issue of process. The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify. The issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage; for the person complained against can` be legally called upon to answer; the accusation made against him only when a process has issued and he is put on trial."*

It would thus be clear from the two decisions of this Court that the scope of the inquiry under s. 202 of the. Code of Criminal Procedure is extremely limited-limited only to the ascertainment of the truth of falsehood, of the allegations made in the complaint-(1) on the materials placed by the complaint before the Court. (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that, the accused may have. In fact it is well settled that in proceedings under s. 202 the accused has got absolutely no locus us standi and is not entitled to be heard on the

question whether the process should be issued against him or not.

Mr. Bhandare laid great stress on the words "the truth or falsehood of the complaint" and contended that in determining whether the complaint is false the Court can go into the question of the broad probabilities of the case or intrinsic infirmities appearing in the evidence. It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercise his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under s. 202 of the Code of Criminal Procedure which culminates into an order under s. 2042 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

> *(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does net disclose the essential ingredients of an offence which is alleged against the accused;*
>
> *(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;*
>
> *(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and .*
>
> *(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.*

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.

Indeed if the documents or the evidence produced by the accused is allowed to be taken by the Magistrate then an inquiry under s. 202 would have to

be converted into a full dress trial defeating the very object for which this section has been engrafted he High Court in quashing the order of the Magistrate completely failed. To consider the limited scope of an inquiry under s. 202. Having gone through the order of the Magistrate we do not find any error or law committed by him. The Magistrate has exercised his discretion and has given cogent reasons for his conclusion. Whether the reasons were, good or bad, sufficient or insufficient, is not a matter which could have been examined by the High Court in revision. We are constrained to observe that the High Court went out of its way to write a laboured judgment highlighting certain aspect of the case of the accused as appearing from the documents filed by them which they were not entitled to file and which were not entitled in law to be considered."

39 Thus, the Supreme Court in the above referred decision made it very clear that if the Magistrate has exercised his discretion and has given cogent reasons for his conclusion, then the High Court should not go into the question whether the reasons are good or bad, sufficient or insufficient.

40 At the same time, it is equally true that allowing the criminal proceedings to continue, when the pre-summoning of the evidence does not make out any offence, would tantamount to the abuse of the process of the Court. Indisputably, the judicial process should not be an instrument of oppression or needless harassment. The court should be circumspect and judicious in exercising its discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of a private complainant as vendetta to harass the persons needlessly.

41 In the case of **P.S. Meherhomji vs. K.T. Vijay Kumar & Ors., (2015) 1 SCC 788**, the Supreme Court observed in para 15 as under;

"So far as the complaint alleging the offence under section 499 IPC is concerned, if on consideration of the allegations the complaint is supported

by a statement of the complainant on oath and the necessary ingredients of the offence are disclosed, the High Court should not normally interfere with the order taking cognizance."

42 In **Dhanalakshmi vs. R. Prasanna Kumar, (1990) Supp SCC 686**, a three Judge Bench of the Supreme Court held as under;

> *'Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent powers to prevent abuse of the process of Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases 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 is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers under Section 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide, frivolous or vexatious. In that event there would be no justification for interference by the High Court.'*

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43 In **Chand Dhawan vs. Jawahar Lal, (1992) 3 SCC 317,** the Supreme Court, while considering the power of the High Court under section 482 Cr.P.C. and quashing the criminal proceedings, observed that when the High Court is called upon to exercise its jurisdiction to quash the proceedings at the stage of the Magistrate taking cognizance of the offence, the High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet, do not in law constitute or spell out any offence and that resort to criminal proceedings would, in the circumstances, amount to an abuse of the process of court or not.

44 In **Radhey Shyam Khemka vs. State of Bihar, (1993) 3 SCC 54**, the Supreme Court, again, held:

> *"The complaint made by the Deputy Secretary to the Government of India to the CBI mentions different circumstances to show that the appellants did not intend to carry on any business. In spite of the rejection of the application by the Stock Exchange, Calcutta, they retained the share moneys of the applicants with dishonest intention. Those allegations were investigated by the CBI and ultimately chargesheet has been submitted. On basis of that chargesheet cognizance has been taken. In such a situation the quashing of the prosecution pending against the appellants only on the ground that it was open to the applicants for shares to take recourse to the provisions of the Companies Act, cannot be accepted. It is a futile attempt on the part of the appellants, to close the chapter before it has unfolded itself. It will be for the trial court to examine whether on the materials produced on behalf of the prosecution it is established that the appellants had issued the prospectus inviting applications in respect of shares of the Company aforesaid with a dishonest intention, or having received the moneys from the applicants they had dishonestly retained or misappropriated the same. That exercise cannot be performed either by the High Court or by this Court. If accepting the allegations made and charges levelled on their face value, the Court had come to conclusion that no offence under the Penal Code was disclosed the matter would have been different. This Court has repeatedly pointed out that the High Court should not while exercising power under Section 482 of the Code usurp the jurisdiction, of the trial court. The power under Section 482 of the Code has been vested in the High Court to quash a prosecution which amounts to abuse of the process of the court. But that power cannot be exercised by the High Court to hold a parallel trial, only on basis of the statements and documents collected during investigation or enquiry, for purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial is allowed to proceed. "*

45 In **Mushtaq Ahmad vs. Mohd. Habibur Rehman Faiz, (1996) 7 SCC 440**, the Supreme Court observed;

> *'Having perused the impugned judgment in the light of the complaint and its accompaniments we are constrained to say, that the High Court exceeded its jurisdiction under Section 482 Cr.P.C. in passing the impugned judgment and order. It is rather unfortunate that though the High Court referred to the decision in **State of Haryana Vs. Bhajan Lal (1992 Supp. (1) SCC 33**5) wherein this Court has enumerated by way of*

illustration the categories of cases in which power to quash complaint or FIR can be exercised, it did not keep in mind - much less adhered to – the following note of caution given therein :-

> *"We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice.""*

46 The principles of law deducible from the aforenoted case law may be summarised as under:

[1] The object of Section 202 of the Code, as contained in the new Code, is for the purpose of deciding whether or not there is sufficient ground for proceeding on the basis of the complaint, which is different from the corresponding section in the old Code, which was meant for ascertaining the truth or falsehood of the complaint touching the merits of the case.

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[2] The object of an inquiry under Section 202 is the ascertainment of the fact whether the complaint lodged before the Court has any valid foundation calling for issue of process to the person complained against or whether the complaint is a baseless one on which no action need be taken.

[3] The scope of an inquiry under Section 202 of the Code is extremely limited, and at this stage, the accused has no *locus standi*.

[4] For determining the question whether any process is to be issued or not, what the Court has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the stage of trial and not at the stage of inquiry.

[5] At the stage of issuing process, the Court is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be *prima facie* satisfied whether there are sufficient grounds for proceedings against the accused.

[6] For issuing process, on receipt of a complaint, it is not incumbent upon the Court, as a rule of necessity, either to hold an inquiry or direct an investigation, as contemplated in the section.

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47 Bearing the aforesaid principles of law in mind, I looked into the exhaustive inquiry report of the police officer concerned, which is on record. The report is running in more than two hundred pages. A close reading of the report reveals more than a *prima facie* case to proceed against, not only the sitting Minister of State for Fisheries, but even against the former Minister of Agriculture Shri Dilip Sanghani. The report reveals that all the accused persons, in collusion and connivance with each other and by abusing their position, caused a loss of Rs.21,04,64,515/- to the Government exchequer over a period of five years by arbitrarily awarding contracts to the different parties for their

personal monetary gain. It appears that the overall scam is of about Rs.400 Crore. Surprisingly, the Lokayukta of the State of Gujarat gave a clean chit to one and all. The allegations levelled against the accused persons of corruption and the *prima facie* materials on record to substantiate such allegations are sufficient, in my view, to put the writ applicants to trial. In my view, no case is made out for quashing of the criminal proceedings at this stage. It appears that the Special Judge, after due consideration of the complaint as well as the inquiry report, arrived at the subjective satisfaction that more than a *prima facie* case is made out for issue of process to the accused persons for the offences punishable under the provisions of the Act, 1988. In such circumstances, I see no good reason to disturb such order passed by the Special Judge. The learned counsel appearing for the respective writ applicants tried to pick up few stray lines here or there from the inquiry report to make good their case that the prosecution against the writ applicants is frivolous or baseless. What is necessary to be looked into is the overall inquiry report and the same, in my opinion, do disclose more than a *prima facie* case sufficient to proceed against the accused persons in accordance with law. Way back on 29th September 2008, the Division Bench of this Court observed in clear terms that the concerned Minister usurped the power vested in the competent authority and awarded the contracts of fishing lease arbitrarily by showing undue favour for extraneous reasons. It appears that the overall scam is of Rs.400 Crore.

48 The final conclusion drawn by the Inquiry Officer, in his inquiry report as regards the sitting Minister is concerned, is as under:

> "2... That the accused person himself had put up notes on the files of the department on 30.03.2008 for granting contract of the 12 dams on 30.06.2008 and 38 dams on 30.07.2008 making total of 50 dams without following tender method with upset price wherein below

mentioned two paragraphs are noted.

(1) With regard to the decision taken in the meeting, I (Minister for State) had detailed discussion with the Secretary. Commissioner and Deputy Commissioner of Fisheries regarding allocation of the dam and lake for fishery.

(2) The applications received were scrutinized by me (Hon'ble Minister for the State, Fisheries). Deputy Commissioner of Fisheries department and the Secretary of Fisheries. Following decision was taken for granting lease keeping in mind the merits of the applicants, area, backwardness, available equipments and manpower.

With regard to the aforesaid writing, the statement of the then Secretary Shri Arunkumar S. Sutariya was recorded on 16.01.2014. The statement of the then Fisheries Commissioner Shri Amrendra Kumar Rakesh was recorded on 23.01.2014 and the statement of the then Deputy Commissioner, Fisheries Dr. H. B. Dave was recorded on 19.02.2014. It was revealed by them in their statements that no such meeting was held and no discussion had taken place and no decision with regard to scrutiny of the applications for grant of lease of dams and lakes was taken in their presence. Therefore, the note contained in aforesaid two paragraphs made on the files by the accused alleging presence of the Secretary, Commissioner and Deputy Commissioner, does not get factual support. Meaning thereby, it appears that the accused Shri Parsottambhai Odhavji Solanki had arbitrarily made such notes.

Out of the points mentioned in the notes put up for allocating 12 dams on 30.06.2008 and 38 dams on 30.07.2008, the Minister for State Shri Parshottambhai Solanki or any other accused person have not produced any factual or documentary evidence in support of the aforesaid points except the evidence of Padhar and during the course of entire investigation no fact has been found supporting the aforesaid points.

Even the resolution No. FDX-112003-1648-T dated 25.02.2004 of the Ports and Fisheries Department of the Gujarat Government regarding to contract policy of granting contract of the dams under the Government has been approved at the level of Hon'ble Chief Minister. There is a provision in point No. 3(B)(3) of the resolution that all the dams above 200 hectare falling within the non tribal area shall be given on lease in favour of the highest bidder through tender method and as per provisions of point No. 6 and 7 of the resolution, there is a provision that in special cases, the power of giving relaxation in the contract policy is vested with

the State Government (Hon'ble Chief Minister). As per point no 14 of the schedule 2 (See schedule 1 Rule 9) of the working Rules 1990 of the Gujarat Government "(Proposals involving any important change of policy or practice) 16-(Proposals to vary or reverse a decision previously taken by the counciilcabinet). Thus. The accused person has no power to make any changes in the contract policy. By misusing his power. He has put his signature and given consent on the notes on file put up by Minister for State Shri Parshottambhai Solanki regarding decision to grant contract of 12 dams on 30.06.2008 and 38 dams on 30.07.2008 making total of I 50 dams to special person/Society/group/Sangh at upset price without following tender procedure and thereby granted contract of dam on 05.07.2008 and 04.08.2008 for 12 + 38 dams making total of 50 dams with upset price to specific person/society/group/sangh. By the order of the Hon'ble Gujarat High Court, all such contracts were cancelled w.e.f. 02.12.2008,and thereafter the contracts of dam were awarded under tender policy. Thus, during the period of one year, from the contract earlier granted for the dams with upset price, the income of Rs. 26,36,835/was earned by the government and while giving contract of dams through tender policy. The Income of Re. 4,47,29,738/- was earned. Thus during the period of one year there appears difference of Rs. 4,20,92,903/- (more income) The contract of aforesaid dams was given for the period of five years. Thus, while counting for the duration of five years, the difference (more income)appears at Rs. 21,04,64,515/-. In this case, contracts of 12 dams had been given on 05.07.2008 and 38 dams on 04.08.2008 with upset price and such contracts had been cancelled on 02.12.2008. Thus, while considering the difference of such period, the annual difference of 12 dams appears Rs. 3,25,92,681/- and thus the difference of five month comes to Rs. 1,35,80,283/-. Moreover, the annual difference (more income) of 38 dams comes to Rs.95,00,222/- and its four months difference appears Rs. 3,32,06,740/-. Meaning thereby the total difference (more income) comes to Rs. 1,67,87,023/-. Thus, the contractors have been benefited with profit and loss has been caused to the government. Thus, the then Minister for State Shri Parsottambhai Solanki, the then Minister Shri Dilipbhai Sanghani, the then Secretary Shri Arunkumar S. Sutariya, the then Deputy Secretary Shri V.T. Kharadi, the then Under Secretary Shri K. L. Tabiyar, Section Officer Smt. Chandrikaben and Deputy Section Officer Shri PC Bhatt have in collusion with each other and misusing their office and authority have caused loss of Rs.21,04,64,515/- to the Government for five years (in this case, the contracts of dams were given on upset price and while counting for that period, Rs.1,67,87,023/-) and by doing so they have committed offence."

49 So far as the former Minister namely *Shri Dilip Sanghani* is concerned, the following has been observed by the Inquiry Officer in his inquiry report:

“that by resolution No.FDX-112003-1648-T dated 25.02.2004 of Ports and Fisheries Department, the Government of Gujarat has framed policy for granting fishing contract at the dams under the government and the policy has been approved at the level of Hon'ble Chief Minister. The policy contain. A provision tn pow No 3(B)(3) of the resolution to the effect that all the dams above 200 hectare falling within non tribal areas shall be granted in favour of the higher bidder through tender method and as per provisions of point No 6 and 7 of the resolution regarding contact policy, in special cases, the power of giving relaxation to the contract policy is with the State Government (Hon'ble Chief Minister). As per point no.14 of the schedule 2 (See schedule 1 Rule 9) of the Rules of Working of Government 1990 of the Gujarat Government “(Proposals Involving any Important change of policy or practice) 16-(Proposals to vary or reverse a decision previously taken by the council/cabinet) the accused person has no power to make any changes in the contract policy but by misusing his power, he has put his signature and given consent on the notes on file put up by Minister for State Shri Parshottambhai Solanki regarding decision to grant contract of 12 dams on 30.06.2008 and 38 dams on 30.07.2008 making total of 50 dams to special persons/Society/group/Sangh on upset price without following tender procedure and thereby. Granted contract of dam on 05.07.2008 and 04.08.2008 for 12 + 38 dams in all total 50 dams with upset price to specific person/society/group/sangh, but as per the order of the Hon’ble Gujarat High Court, such all the contracts were cancelled w.e.f. 02.12.2008 and thereafter contracts of dam were granted with tender policy. Thus, during the period of one year of contract earlier granted for the dams with upset price. The income of Rs. 26,36,835/- was earned by the government and by giving contract of dams through tender policy, income of Rs. 4,47,29,738/- was earned during one year. Meaning thereby, during one year duration there appears difference of Rs.4,20,92,903/(more income). The contract of aforesaid dams was given for the period of five years. Thus. While counting for the duration of five years, the difference (more income)appears at Rs. 21,04,64,515/. In this case, contracts of 12 dams had been given on 05.07.2008 and 38 dams on 04.08.2008 with upset price and such contracts had been cancelled on 02.12.2008. Thus, while considering the difference of such period, the annual difference of 12 dams appears Rs. 3,25,92,681I-and thus the difference of five month appears Rs. 1,35,80,283/-. Moreover, the annual difference (more income) of 38 dams appears to Rs. 95,00,222/and its four months difference appears Rs.3,32,06,740/which means total difference (more income) comes to Rs. 1,67,87,023/-. Meaning thereby, the contractors have been benefited with huge profit and loss has been caused to the government. Thus, the accused persons, the then Minister for State Shri Parsottambhai Solanki, the then Secretary Shri Arunkumar S. Sutariya, the then Deputy Secretary Shri V.T. Kharadi, the then Under Secretary Shri K. L. Tabiyar, Section Officer Smt. Chandrikaben and Deputy Section Officer Shri PC Bhatt have in collusion with each other and

by misusing their office and authority have caused loss of Rs. 21,04,64,515/to the Government for five years (in this case, the contracts of dams were given on upset price and while counting for that period, Rs. 1,67,87,023/-) and by doing so they have committed offence. "

- PREVENTION OF CORRUPTION ACT, 1988:

50 I must also look into few relevant provisions of the Act, 1988. Section 4 of the Act provides that the cases under the Prevention of Corruption Act, 1988 shall be tried by the Special Judges. Section 4 reads as under:

"***4. Cases triable by special Judges.—***

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.

(2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis."

51 Section 5 of the Act, 1988 lays down the procedure and powers of the Special Judge. Section 5 reads as under:

*"**5. Procedure and powers of special Judge.**—*

(1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973

(2 of 1974), for the trial of warrant cases by the Magistrates.

(2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall, for the purposes of sub-sections (1) to (5) of section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under section 307 of that Code.

(3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

(4) In particular and without prejudice to the generality of the provisions contained in sub-section (3), the provisions of sections 326 and 475 of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply to the proceedings before a special Judge and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate.

(5) A special Judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted.

(6) A special Judge, while trying an offence punishable under this Act, shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944 (Ord. 38 of 1944).”

52 The power of a Special Judge to take cognizance are wide and unlimited. Section 5 gives clear authority to the Special Judge to take cognizance of an offence and no limitation as been placed as to how he should do it. He may act on a report submitted by a police officer. He may act on a private complaint or he may also act on the basis of the information derived from any source and also on his personal knowledge and suspicion. The Special Judge is a creature of a statute and enjoys a unique position, which is not known to the Code of Criminal Procedure.

He has been clothed with the special authority to take cognizance of offences under Section 8 of the Criminal Law Amendment Act, 1952. Even if, therefore, none of the provisions of the Code of Criminal Procedure governing the taking up of cognizance including Section 190 of the Cr.P.C. is applicable to a Special Judge, still, that will not affect his powers of taking cognizance of a case.

53 A private complaint can be entertained by the Special Judge in respect of the offence committed by a public servant is no longer *res integra* after the decision of the Supreme Court in the case of **A.R. Antulay vs. Ramdas Sriniwas Nayak** reported in **AIR 1984 SC 718.** In this regard, may refer to some of the observations of the Supreme Court as under:

> *"6. It is a well recognised principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enact or creating an offence indicates to the contrary. The scheme of the Criminal P. C. envisages two parallel and independent agencies for taking criminal offences to Court. Even for the most serious offence of murder, it was not disputed that a private complaint can, not only be filed but can be entertained and proceeded with according to law. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute creating an offence provides for the eligibility of the complainant, by necessary implication the general principle gets excluded by such statutory provision. Numerous statutory provisions, can be referred to in support of this legal position under as (i) Section 187-A of Sea Customs Act, 1878, (ii) Section 97 of Gold Control Act, 1968, (iii) Section 6 of Imports and Exports Control Act, 1947, (iv) Section 271 and Section 279 of the Income-tax Act, 1961, (v) Section 61 of the Foreign Exchange Regulation Act, 1973, (vi) Section 621 of the Companies Act, 1956 and (vii) Section 77 of the Electricity (Supply) Act. This list is only illustrative and not exhaustive. While Section 190 of the Criminal P. C. permits anyone to approach the Magistrate with a complaint, it does not prescribe any qualification the complainant is required to fulfil to be eligible to file a complaint. But where an eligibility criterion for a complainant is contemplated specific provisions have been made such as to be found in Sections 195 to 199 of the Cr. P. C. These specific provisions clearly indicate that in the absence of any such statutory provision, a locus standi of a complainant is a concept foreign to criminal jurisprudence. In*

other words, the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provision. This general principle of nearly universal application is founded on a policy that an offence i.e. an act or omission made punishable by any law for the time being in force (See Section 2(n), Cr. P. C.) is not merely an offence committed in relation to the person who suffers harm but is also an offence against society. The society for its orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the State representing the people which would exclude any element of private vendatta or vengeance. If such is the public policy underlying penal statutes, who brings an act or, omission made punishable by law to the notice of the authority competent to deal with it, is immaterial and irrelevant unless the statute indicates to the contrary. Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a straight-jacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception. To hold that such an exception exists that a private complaint for offences of corruption committed by public servant is not maintainable, the Court would require an unambiguous statutory provision and a tangled web of argument for drawing a far-fetched implication, cannot be a substitute for an express statutory provision. In the matter of initiation of proceeding before a special Judge under Section 8(1), the Legislature while conferring power to take cognizance had three opportunities to unambiguously state its mind whether the cognizance can be taken on a private complaint or not. The first one was an opportunity to provide in Section 8(1) itself by merely stating that the special Judge may take cognizance of an offence on a police report submitted to it by an investigating officer conducting investigation as contemplated by Section 5-A. While providing for investigation by designated police officers of superior rank, the Legislature did not fetter the power of special Judge to take cognizance in a manner otherwise than on police report. The second opportunity was when by Section 8(3) a status of a deemed public prosecutor was conferred on a private complainant if he chooses to conduct the prosecution. The Legislature being aware of a provision like the one contained in S. 225 of the Criminal P. C., could have as well provided that in every trial before a special Judge the prosecution shall be conducted by a Public Prosecutor, though that itself would not have been decisive of the matter. And the third opportunity was when the Legislature while prescribing the procedure prescribed for warrant cases to be followed by special Judge did not exclude by a specific provision that the only procedure which the special Judge can follow is the one prescribed for trial of warrant cases on a police report. The disinclination of the Legislature to so provide points to the contrary and no canon of construction permits the Court to go in search of 'a hidden or implied limitation on the power of the special Judge

to take cognizance unfettered by such requirement of its being done on a police report alone. In our opinion, it is no answer to this fairly well-established legal position that for the last 32 years no case has come to the notice of the Court in which cognizance was taken by a special Judge in a private complaint for offences punishable under the 1947 Act. If something that did not happen in the past is to be the sole reliable guide so as to deny any such thing happening in the future, law would be rendered static and slowly whither away.

7. The scheme underlying Criminal P.C. clearly reveals that anyone who wants to give information of an offence may either approach the Magistrate or the officer in charge of a Police Station. If the offence complained of is a non-cognizable one, the Police Officer can either direct the complainant to approach the Magistrate or he may obtain permission of the Magistrate and investigate the offence. Similarly anyone can approach the Magistrate with a complaint and even if the offence disclosed is a serious one, the Magistrate is 'competent to take cognizance of the offence and initiate proceedings. It is open to the Magistrate but not obligatory upon him to direct investigation by police. Thus two agencies have been set up for taking offences to Court. One would therefore, require a cogent and explicit provision to hold that Section 5-A displaces this scheme.

8. The Prevention of Corruption Act, 1947 ('1947 Act' for short) was put on the statute book in the year 1947. Section 5-A did not form part of the statute in 1947. Section 5-A was first introduced in the Act in the year 1952. Prior thereto Section 3 of the 1947 Act which made the offences under Sections 161 and 165, IPC cognizable had a proviso engrafted to it which precluded investigation of the offences under the Prevention of Corruption Act by a police officer below the rank of Deputy Superintendent of Police except without the order of a Magistrate of the first class. There was an identical provision in sub-section (4) of Section 5 for investigation of the offence of criminal misconduct. Section 5-A makes a provision for investigation by police officers of higher rank. Section 5-A starts with a non obstante clause that: 'Notwithstanding .anything contained in the Code of Criminal Procedure, 1898, no police officer below the rank ....' Assuming that Section 5-A did not make it obligatory to conduct investigation by police officer of a certain rank, what would have been the position in law.

9. Chapter XII of the Criminal P. C., 1973 bears the heading 'Information to the police and their powers to investigate' Section 154 provides for information to police in cognizable cases. It casts a duty on the officer in charge, of a police station to reduce to writing every relating to commission of a cognizable offence given to him and the same will be read over to the informant and the same shall be signed by the informant and a copy thereof shall be given to him. If information given to an officer in

charge of a Police Station disclosed a non-cognizable offence, he has to enter the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf and to refer the informant to the Magistrate (S. 155 (1).) Sub-s. (2) puts an embargo on the power of the police officer-in-charge of police station to investigate a non-cognizable offence without the order of a Magistrate having power to try the case or commit the case for trial. S. 156 sets out the powers of the officer in charge of police station to investigate cognizable cases. Sub-section (2) of Section 156 may be noticed. It says that 'no proceeding of a Police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under the section to investigate.' Sub-section (3) confers power on the Magistrate empowered under Section 190 to take cognizance of an offence, to order an investigation as set out in sub-sections (1) and (2) of Section 156. Section 167 enables the Magistrate to remand the accused to police custody in the circumstances therein mentioned; Section 173 provides that 'every investigation under Chapter XII shall be completed without unnecessary delay and as soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, setting out various things enumerated in the section. Sub-section (8) of Section 173 provides that despite submission of the report on completion of the investigation, further. investigation can be conducted in respect of the same offence and further evidence so collected has to be forwarded to the same Magistrate. The report of this further investigation shall by and large conform with the requirements of sub-sections (2) to (6) Fasciculus of sections in Chapter XIV prescribed conditions requisite for initiation of proceedings Section 190 provides that subject to the provisions of the Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2). may take cognizance of any offence- (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts, and (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed Section 191 obliges the Magistrate when he takes cognizance of an offence under Clause (c) of sub-section (1) of S. 190, to inform the accused when he appears before him, that he is entitled to have the case inquired into or tried by another Magistrate. Section 193 provides that 'except as otherwise expressly provided in the Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code.'"

"30. It was submitted that there is further internal evidence pointing in the direction that a private complaint cannot be entertained by a special

Judge. Section 225 in Chapter XVIII containing provisions prescribing procedure of trial before a Court of Session provides that 'in every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor.' Last part of Section 8 (3) of the 1952 Act provides that . ... the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.' It was urged that public prosecutions are ordinarily launched in the name of the State because in matters of serious offences the society is interested in punishing the antisocial elements who may be a menace to society and that such prosecution is not for satisfying private lust or sense of vengeance. Proceeding along, it was stated that the scheme of Criminal P. C. clearly shows that serious offences are exclusively triable by a Court of Session and that even if a commitment to the Court of Session is made upon an inquiry held by a Magistrate taking cognizance of the Offence on a private complaint, once the case is committed to a Court of Session, the role of the private complainant becomes insignificant. The State takes over the prosecution and the public prosecutor shall necessarily be in charge of the prosecution. And it was pointed out that public prosecutor is appointed by the Central or the State Government. It was urged that appointment of a public prosecutor under Section 24 of the Criminal P. C. is a solemn duty to be performed by the Central or the State Government, as the case may be, and that too after consultation with the High Court. And it is such public prosecutor who shall alone be entitled to conduct the trial before Court of Session. In order to acquaint us with the role, the dignity and the responsibility of a public prosecutor, attention was drawn to ***Shwe Pru v. The King,*** *AIR 1941 Rang 209;* ***Amlesh Chandra v. The State,*** *(AIR 1952 Cal 481;* ***Raj Kishore Rabidas v. The State****, AIR 1969 Cal 321. In* ***Re Bhupalli Malliah,*** *AIR 1959 Andh Pra 477 and* ***Medichetty Ramakistiah v. State of Andhra Pradesh,*** *AIR 1959 Andh Pra 659. These decisions purport to indicate the objectivity and the fairness with which a public prosecutor in charge of the case shall conduct the prosecution and it is no part of his duty to attempt to obtain a conviction act all costs. His duty is to fairly analyse the evidence for and against the accused and that he should not withhold any evidence which has a bearing on the issues before the Court. In other words. he must be fair and objective in his approach to die case animated by a desire to vindicate justice and no more. It was urged that, if this be the well-recognised role of a public prosecutor, how horrendous it would appear if a private complainant motivated by a desire to wreak vengeance against the accused is to be deemed to be a public prosecutor. It was said that such a private complainant cannot be elevated to the status of a public prosecutor but the deeming fiction enacted in latter part of S. 8 (3) would clothe him with such a status of a public prosecutor which he was hardly qualified to enjoy. As a second string to the bow, it was said that Section 321 of the Criminal P. C. generally confers power on a public prosecutor to withdraw the prosecution subject to limitations therein prescribed. The submission is that if a private complainant who chooses to conduct his case and thereby*

enjoys the status of a deemed public prosecutor he would be able to polute the fountain of justice by initiating some frivolous prosecution and then withdraw it if his palms are greased. It was also said that the accused may put up a bogus complainant and. make a pretence of trial and escape a serious prosecution upon high level investigation These are wild imagining irrelevant for the purpose of construction of a provision in a statute. Further this submission role that the Court has to play before any prosecution can be withdrawn at the instance of a public prosecutor. That a public prosecutor may abuse his office is not determinative as to who should be a public prosecutor. The deeming fiction enacted in Section 8 (3) is confined to the limits of its requirement in that the person conducting a prosecution before a special Judge is to be deemed to be a public prosecutor. In fact, this fiction created by Section 8 (3), would rather negative the argument of the appellant that a private complaint is not maintainable, inasmuch as the Legislature could have inserted a provision analogous to Section 225 that a prosecution before a special Judge shall be conducted by a public prosecutor. On the contrary, conscious of the position that a private complaint may be filed before a special Judge who may take cognizance of the offences on such a complaint, the Legislature wanted to clothe the person in charge of the prosecution before a special Judge with the status of a public prosecutor for the purposes of the Criminal P. C. This is an additional reason why the contention of the appellant that a private complaint is not maintainable cannot be entertained.

31. It was then submitted that if the object underlying 1952 Act was to provide for a more speedy trial of offences of corruption by a public servant, this laudable object would be thwarted if it is ever held that a private complaint can be entertained by a special Judge. Developing the argument it was pointed out that assuming that a private complaint is maintainable before taking cognizance, a special Judge will have to examine the complainant and all the witnesses present as enjoined by Section 200. The Judge thereafter ordinarily will have to postpone issue of process against the acused, and either inquire into the case himself or direct an investigation to be made by a police officer and in cases under the 1947 Act by police officers of designated tank for the purpose of deciding whether or not there is sufficient ground for proceeding. (Section 202 (1)). If the Judge proceeds to hold the inquiry himself, he is obliged to take evidence on oath but it was said that if the Court of special Judge is a Court of Session, the case would be governed by proviso to sub-section (2) of Section 202, Criminal P. C. and that therefore, he will have to call upon the complainant to produce all his witnesses and examine them on oath. This would certainly thwart a speedy trial was the apprehension disclosed and therefore, it was said that there is internal contra-indication that a private complaint is not maintainable. We find no merit in the submission. <u>As has been distinctly made clear that a Court of special Judge is a Court of original criminal jurisdiction and that it can take cognizance</u>

of an offence in the manner hereinbefore indicated, it may be that in order to test whether the complaint disclosed a serious offence or that there is any frivolity involved in it, the Judge may insist upon holding an inquiry by postponing the issue of process. When a private complaint is filed, the Court has to examine the complainant on oath save in the cases set out in the proviso to Section 200, Cr. P. C. After examining the complainant on oath and examining the witnesses present, if any, meaning thereby that the witnesses not present need not be examined, it would be open to the Court to judicially determine whether a case is made out for issuing process. When it is said that Court issues process, it means the Court has taken cognizance of the offence and has decided to initiate the proceeding and as a visible manifestation of taking cognizance, process is issued which means that the accused is called upon to appear before the Court. This may either take the form of a summons or a warrant, as the case may be. It may be that after examining the complainant and his witnesses, the Court in order to doubly assure itself may postpone the issue of process, and call upon the complainant to keep his witnesses present. The other option open to the Court is to direct investigation to be made by a police officer. And if the offence is one covered by the 1947 Act, the investigaion, if directed, shall be according to the provision contained in Section 5-A. But it must be made distinctly clear that it is neither obligatory to hold the inquiry before issuing process or to direct the investigation of the offence by police. The matter is in the judicial discretion of the Court and is judicially reviewable depending upon the material disclosed by the complainant in his statement under oath under Section 200, called in the parlance of Criminal Courts verification of the complaint and evidence of witnesses if any. It was however, urged that if Section 5-A can be dispensed with, by holding that a private complaint is maintainable, the Court at least should ensure pre-process safeguard by insisting upon the examination of all witnesses that the complainant seeks to examine and this will be counter-productive as far as the object of a speedy trial is concerned. Viewed from either angle, there is no merit in this submission. Primarily, examination of witnesses event at a pre-process stage by special Judge is not on the footing that the case is exclusively triable by a Court of Sessions as contemplated by Section 202 (2) proviso. There is no commitment and therefore, S. 202 (2) proviso is not attracted. Similarly, till the process is issued, the accused does not come into the picture. He may physically attend but is not entitled to take part in the proceeding. (See Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi, (1976) 3 SCC 736 : (AIR 1976 SC 1947)). Upon a complaint being received and the Court records the verification, it is open to the Court to apply its mind to the facts disclosed and to judicially determine whether process should or should not be issued. It is not a condition precedent to the issue of process that the Court of necessity must hold the inquiry as envisaged by Section 202 or direct investigation as therein contemplated. The power to take cognizance without holding inquiry or directing investigation is implicit in S. 202 when it says that the Magistrate may 'if he thinks fit, postpone the

issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer . . . .for the purpose of deciding whether or not there is sufficient ground for proceeding. Therefore, the matter is left to the judicial discretion of the Court whether on examining the complainant and the witnesses if any as contemplated by Section 200 to issue process or to postpone the issue of process. This discretion which the Court enjoys cannot be circumscribed or denied by making it mandatory upon the Court either to hold the inquiry or direct investigation. Such an approach would be contrary to the statutory provision. Therefore, there is no merit in the contention that by entertaining a private complaint, the purpose of speedy trial would be thwarted or that a pre-process safeguard would be denied.

32. Further when cognizance is taken on a private complaint or to be precise otherwise than on a police report, the special Judge has to try the case according to the procedure prescribed for trial of warrant cases instituted otherwise than on police report by a Magistrate (Sections 252 to 258 of 1898, Criminal P. C.) Section 252 requires that when accused is brought before a Court, the Court shall proceed to hear the complainant and take all such evidence as may be produced in support of the prosecution. Accused has a right to cross-examine complainant and his witnesses. If upon considering the evidence so produced, the Court finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Court shall discharge the accused (Section 253 ibid). If, on the other hand, the Court is of the opinion that there is ground for presuming that the accused has committed an offence, which the Court is competent to try, a charge shall be framed in writing against the accused (Section 254 ibid). After the accused pleads not guilty to the charge, all prosecution witnesses examined before the charge shall be recalled for further cross- examination. Prosecution may examine additional witnesses whom the accused would be entitled to cross-examine. Thereafter the accused may enter on his defence and may examine witness in defence. This procedure provides more adequate safeguard than the investigation by police officer of designated rank and therefore, search for fresh or additional safeguard is irrelevant."

54 Thus, from the above, it is clear that a private complaint, for the offence punishable under the Act, 1988, is maintainable in law. A Special Judge is empowered to take cognizance of the offences without the accused being committed for trial and in trying the accused persons, the Special Judge shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by the Magistrates.

55 I am not impressed by the submission of the learned counsel appearing for the writ applicant that the Special Judge committed an error in taking cognizance upon the complaint without examination of all the witnesses named in the complaint. In fact, this issue is also no longer *res integra* in view of the decision of the Supreme Court in the case of **Shivjee Singh vs. Nagendra Tiwary and others [Criminal Appeal No.1158 of 2010 decided on 6th July 2010].** I may quote the relevant observations of the Supreme Court as under:

> *"8. The object of examining the complainant and the witnesses is to ascertain the truth or falsehood of the complaint and determine whether there is a prima facie case against the person who, according to the complainant has committed an offence. If upon examination of the complainant and/or witnesses, the Magistrate is prima facie satisfied that a case is made out against the person accused of committing an offence then he is required to issue process. Section 202 empowers the Magistrate to postpone the issue of process and either inquire into the case himself or direct an investigation to be made by a police officer or such other person as he may think fit for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 203, the Magistrate can dismiss the complaint if, after taking into consideration the statements of the complainant and his witnesses and the result of the inquiry/investigation, if any, done under Section 202, he is of the view that there does not exist sufficient ground for proceeding. On the other hand, Section 204 provides for issue of process if the Magistrate is satisfied that there is sufficient ground for doing so. The expression "sufficient ground" used in Sections 203, 204 and 209 means the satisfaction that a prima facie case is made out against the person accused of committing an offence and not sufficient ground for the purpose of conviction. This interpretation of the provisions contained in Chapters XV and XVI of Cr.P.C. finds adequate support from the judgments of this Court in* ***R.C. Ruia v. State of Bombay,*** *1958 SCR 618 : (AIR 1958 SC 97),* ***Vadilal Panchal v. Duttatraya Dulaji Ghadigaonkar (****1961) 1 SCR 1 : (AIR 1960 SC 1113),* ***Chandra Deo Singh v. Prokash Chandra Bose*** *(1964) 1 SCR 639 : (AIR 1963 SC 1430),* ***Nirmaljit Singh Hoon v. State of West Bengal*** *(1973) 3 SCC 753 : (AIR 1972 SC 2639),* ***Kewal Krishan v. Suraj Bhan*** *(1980) Supp SCC 499 : (AIR 1980 SC 1780),* ***Mohinder Singh v. Gulwant Singh*** *(1992) 2 SCC 213 : (AIR 1992 SC 1894 : 1992 AIR SCW 2189) and* ***Chief Enforcement Officer v. Videocon International Ltd.*** *(2008) 2 SCC 492 : (AIR 2008 SC 1213 : 2008 AIR SCW 1203).*

9. In Chandra Deo Singh v. Prokash Chandra Bose (supra), it was held that where there was prima facie evidence, the Magistrate was bound to issue process and even though the person charged of an offence in the complaint might have a defence, the matter has to be left to be decided by an appropriate forum at an appropriate stage. It was further held that the issue of process can be refused only when the Magistrate finds that the evidence led by the complainant is self contradictory or intrinsically untrustworthy.

10. In ***Kewal Krishan v. Suraj Bhan, (AIR 1980 SC 1780) (supra)****, this Court examined the scheme of Sections 200 to 204 and held :*

> *"At the stage of Sections 203 and 204 of the Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202 of the Criminal Procedure Code, there is prima facie evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding" against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial court. The standard to be adopted by the Magistrate in scrutinizing the evidence is not the same as the one which is to be kept in view at the stage of framing charges."*

11. The aforesaid view was reiterated in ***Mohinder Singh v. Gulwant Singh (AIR 1992 SC 1894 : 1992 AIR SCW 2189)*** *(supra) in the following words :*

> *"The scope of enquiry under Section 202 is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should issue or not under Section 204 of the Code or whether the complaint should be dismissed by resorting to Section 203 of the Code on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. But the enquiry at that stage does not partake the character of a full dress trial which can only take place after process is issued under Section 204 of the Code calling upon the proposed accused to answer the accusation made against him for adjudging the guilt or otherwise of the said accused person. Further, the question whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of the enquiry contemplated under Section 202 of the Code. To say in other words, during the course of the enquiry under Section 202 of the Code, the enquiry officer has to satisfy himself simply on the evidence adduced by the prosecution whether prima facie case has been made out so as to put the*

proposed accused on a regular trial and that no detailed enquiry is called for during the course of such enquiry." (Emphasis supplied)

12. The use of the word 'shall' in proviso to Section 202(2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word 'all' appearing in proviso to Section 202(2) is qualified by the word 'his'. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against the accused.

13. We may now refer to the judgment in Rosy v. State of Kerala, (AIR 2000 SC 637) (supra) on which reliance has been placed by both the learned counsel. The factual matrix of that case reveals that the Excise Inspector filed a complaint before Judicial Magistrate, Thrissur for offences punishable under Sections 57-A and 56(b) of the Kerala Abkari Act. As the offences were exclusively triable by the Court of Session, the learned Magistrate committed the case to the Court of Session, Thrissur. After the prosecution examined witnesses, the accused were questioned under Section 313 Cr.P.C. The public prosecutor then filed an application for recalling two witnesses, who were recalled and examined. Thereafter, further statements of the accused under Section 313 were recorded. The accused examined four witnesses. At that stage, an argument was raised that the committal order was bad because the Magistrate did not follow the procedure prescribed in the proviso to Section 202(2). The learned Sessions Judge opined that there was breach of the mandatory provision but made a reference to the High Court under Section 395(2) because he found it difficult to decide the course to be adopted in the matter. The High Court held that the order of committal was vitiated due to violation of the mandate of proviso to Section 202(2). Before this Court, the issue was considered by a two-Judge Bench. M.B. Shah, J., referred to Sections 200 and 202, the judgment of this Court in Ranjit Singh v. State of Pepsu, AIR

1959 SC 843 and held :

> *"Further, it is settled law that the inquiry under Section 202 is of a limited nature. Firstly, to find out whether there is a prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 CrPC the accused has no right to intervene and that it is the duty of the Magistrate while making an inquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made."*

Shah, J. then referred to the ratio of the judgment in Kewal Krishan v. Suraj Bhan, (AIR 1980 SC 1780) (supra) and observed :

> *"In this view of the matter it is apparent that the High Court erred in holding that there was breach of the mandatory provisions of the proviso to Section 202(2) of the Code and the order of committal is vitiated and, therefore, requires to be set aside. The High Court failed to consider the proviso to Section 200, particularly proviso (a) to the said section and also the fact that inquiry under Section 202 is discretionary for deciding whether to issue process (under Section 204) or to dismiss the complaint (under Section 203). Under Section 200, on receipt of the complaint, the Magistrate can take cognizance and issue process to the accused. If the case is exclusively triable by the Sessions Court, he is required to commit the case to the Court of Session."*

THE HIGH COURT OF GUJARAT WEB COPY

Shah, J. also referred to the judgment of the Full Bench of Kerala High Court in Moideenkutty Haji v. Kunhikoya (1987) 1 KLT 635 : (AIR 1987 Ker 184) and of Madras High Court in M. Govindaraja Pillai v. Thangavelu Pillai, 1983 Cri LJ 917, approved the ratio of the latter decision that Section 202 is an enabling provision and it is the discretion of the Magistrate depending upon the facts of each case, whether to issue process straightway or to hold the inquiry and held :

> *"We agree with the conclusion of the Madras High Court to the effect (sic extent) that Section 202 is an enabling provision and it is, the discretion of the Magistrate depending upon the facts of each*

> *case, whether to issue process straightway or to hold the inquiry. However, in case where inquiry is held, failure to comply with the statutory direction to examine all the witnesses would not vitiate further proceeding in all cases for the reasons that*
>
> *(a) in a complaint filed by a public servant acting or purporting to act in discharge of his official duties, the question of holding inquiry may not arise,*
>
> *(b) whether to hold inquiry or not is the discretionary jurisdiction of the Magistrate,*
>
> *(c) even if he has decided to hold an inquiry it is his further discretion to examine the witnesses on oath. If he decides to examine witnesses on oath in a case triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath,*
>
> *(d) it would also depend upon the facts of each case depending upon the prejudice caused to the accused by non-compliance with the said proviso (Section 465), and*
>
> *(e) that the objection with regard to non-compliance with the proviso should be taken at the earlier stage when the charge is framed by the Sessions Court." (Emphasis supplied)*

K.T. Thomas, J. adopted a different approach regarding interpretation of Section 202. He referred to the scheme of Chapters XIV, XV and XVI Cr.P.C. and observed :

> *"Three categories of documents are mentioned in the aforesaid section the copies of which the Magistrate, who proceeds from the stage in Section 204, has to supply to the accused free of cost (in a complaint case involving an offence triable exclusively by a Court of Session). As the words used here are "shall furnish", it is almost a compelling duty on the Magistrate to supply the said documents to the accused. How can the Magistrate supply such documents? [In the present context the documents referred to in the third category mentioned in clause (iii) are not important.] The first category delineated in clause (i) of Section 208 consists of "statements recorded under Section 200 or Section 202, of all persons examined by the Magistrate". (emphasis supplied)*

It is now important to note that the words "if any" have been used in the second category of documents which is delineated in clause (ii) of Section 208, but those words are absent while delineating the first category. In my view those two words have been thoughtfully avoided by Parliament in

clause (i).
If a Magistrate is to comply with the aforesaid requirements in Section 208 of the Code (which he cannot obviate if the language used in the sub-section is of any indication) what is the manner in which he can do it in a case where he failed to examine the witnesses before issuing process to the accused? The mere fact that the word "or" is employed in clause (i) of Section 208 is not to be understood as an indication that the Magistrate is given the freedom to dispense with the inquiry if he has already examined the complainant under Section 200. A case can be visualised in which the complainant is the only eye-witness or in which all the eye-witnesses were also present when the complaint was filed and they were all examined as required in Section 200. In such a case the complainant, when asked to produce all his witnesses under Section 202 of the Code, is at liberty to report to the Magistrate that he has no other witness than those who were already examined under Section 200 of the Code. When such types of cases are borne in mind it is quite possible to grasp the utility of the word "or" which is employed in the first clause of Section 208 of the Code. So the intention is not to indicate that the inquiry is only optional in the cases mentioned in Section 208.

If a case instituted on a complaint is committed to the Court of Session without complying with the requirements in clause (i) of Section 208 of the Code how is it possible for the Public Prosecutor to know in advance what evidence he can adduce to prove the guilt of the accused? If no inquiry under Section 202 is to be conducted a Magistrate who decides to proceed only on the averments contained in the complaint filed by a public servant (who is not a witness to the core allegation) and such a case is committed to the Court of Session, its inevitable consequence would be that the Sessions Judge has to axe down the case at the stage of Section 226 itself as the Public Prosecutor would then be helpless to state "by what evidence he proposes to prove the guilt of the accused". If the offence is of a serious nature or is of public importance the consequence then would be a miscarriage of justice." Thomas, J. then referred to the recommendations made by the Law Commission in its 41st Report and held :

> *"Thus I have no doubt that the proviso incorporated in sub-section (2) of Section 202 of the Code is not merely to confer a discretion on the Magistrate, but a compelling duty on him to perform in such cases. I wish to add that the Magistrate in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses. Of course if the complainant requires the help of the court to summon such witnesses it is open to the Magistrate to issue such summons, for, there is nothing in the Code which prevents the Magistrate from issuing such summons to the witnesses.*
>
> *I reiterate that if the Magistrate omits to comply with the above*

requirement that would not, by itself, vitiate the proceedings. If no objection is taken at the earlier stage regarding such omission the court can consider how far such omission would have led to a miscarriage of justice, when such objection is taken at a later stage. A decision on such belated objection can be taken by bearing in mind the principles adumbrated in Section 465 of the Code." (Emphasis supplied)

14. Although, Shah, J. and Thomas, J. appear to have expressed divergent views on the interpretation of proviso to Section 202(2) but there is no discord between them that non examination of all the witnesses by the complainant would not vitiate the proceedings. With a view to clarify legal position on the subject, we deem it proper to observe that even though in terms of the proviso to Section 202(2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance of the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance of proviso to Section 202(2).

*15. In **Birendra K. Singh v. State of Bihar (**supra), the only question considered by this Court was whether non-compliance of Section 197 Cr.P.C. was fatal to the prosecution. While holding that an objection regarding non-compliance of Section 197 can be raised only after the case is committed to the Court of Session, this Court observed that it was not made aware of the fact whether process was issued after complying with the provisions of Section 202. Therefore, that judgment cannot be read as laying down a proposition of law on interpretation of proviso to Section 202(2). That apart, it is important to mention that in A**bdul Wahab Ansari v. State of Bihar** (2000) 8 SCC 500 : (AIR 2000 SC 3187 : 2000 AIR SCW 3725), a three-Judge Bench held that the decision in **Birendra K. Singh**'s case does not lay down the correct law.*

16. As a sequel to the above discussions, we hold that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to Section 202(2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint and the High Court committed serious error in directing the Chief Judicial Magistrate to conduct further inquiry and pass fresh order in the light of proviso to Section 202(2).”

56 Thus, the examination of all the witnesses cited in the complaint

or whose names are disclosed by the complainant in furtherance of the directions given by the Magistrate in terms of the proviso to Section 202(2) of the Cr.P.C. is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint.

57 Mr. Tanna, the learned senior counsel appearing for the writ applicant of the Special Criminal Application No.5338 of 2015 vehemently submitted that the complaint came to be filed only against one person namely Shri Solanki. He would submit that in the entire complaint, there is not a word or any whisper of an allegation against his client. According to Mr. Tanna, the name of his client surfaced in the course of the police inquiry. In such circumstances, the submission of the learned senior counsel is that as the complaint has not been lodged against his client, the Special Judge could not have taken cognizance and issued process to his client.

58 I am afraid it is not possible to accept the submission canvassed by the learned senior counsel as referred to above. The language of Section 190 of the Code is loaded with significance. It talks of cognizance and that too of the "offence" and not the "offender". The Magistrate first takes cognizance of the offence and thereafter only proceeds to find out who the offenders are. The steps though appear to be intertwined are distinct. The Supreme Court makes it clear in **Raghubans Dubey vs. State of Bihar (AIR 1967 SC 1167) : 1967 Cri LJ 1081**. Sikri J., speaking for the Bench, observed at page SC 1169, AIR 1967 :

> *"In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders, once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent*

up by the Police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence."

59 The view expressed won approval subsequently in **Hareram Satpathy vs. Tikaram Agarwala (AIR 1978 SC 1568) : 1978 Cri LJ 1687** and **Joginder Singh vs. State of Punjab (AIR 1979 SC 339) : 1979 Cri LJ 333**. Thus, the Supreme Court not only enjoins upon the Magistrate to find out, on taking cognizance, who the offenders really are but also casts duty upon him, once he comes to the conclusion that apart from the persons sent up by the Police some other persons are also involved, to proceed against those persons as summoning of such persons is a “part of the proceeding initiated by his taking cognizance of an offence.”

60 The act of taking cognizance is only the fulfillment of a condition requisite for the initiation of judicial proceedings and when the Magistrate takes cognizance it is taken of the case as a whole for trial and not the individual offender. The taking of cognizance thus, does not, in itself, give rise to any vested right in any one. It is a continuous act. This being the position it is within the power of the Magistrate to summon anyone, who, on the basis of the statements recorded in the course of the police inquiry under Section 202 of the Code or the inquiry report itself appears to him to be *prima facie* guilty of the offence, or, to put it in other words, if it appears that there are sufficient grounds to proceed against the persons whose involvement figures, later, in point of time, although not named in the complaint specifically.

61 The expression "cognizance of the offence" has not been defined in the Code and Section 190 of the Code talks of cognizance of offences by the Magistrates. This expression, in its broad and literal sense, means

taking notice of an offence and would include the intention of initiating judicial proceedings against the offender in respect of that offences or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word “cognizance” indicates the point when a Magistrate or a Judge first takes Judicial notice of an offence. Initiation of proceedings is entirely different from taking cognizance of an offence and taking cognizance of an offence is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. In Wharton's Law Lexicon 14th Edition at page 209 "cognizance" is defined, which reads as follows :

> "*Cognizance (Judicial), knowledge upon which a judge is bound to act without having it proved in evidence : as the public statutes of the realm, the ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons, the existence of war with a foreign State, the Several seals of the Kind, the Supreme Court and its jurisdiction, and many other things. A Judge is not bound to take cognizance of current events, however notorious, nor of the law of other countries.*"

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62 When the Magistrate applies his judicial mind to the offence stated in the complaint or the police report, etc. cognizance is said to be taken. When the Magistrate takes judicial notice of the offence cognizance takes place. Whether the Magistrate has taken cognizance of offence on a complaint or on a police report or upon information of a person other than the police officer, depends upon further action taken pursuant thereto and the attending circumstances of the particular case including the mode in which the case is sought to be dealt with or nature of the action taken by the Magistrate. Section 190 of the Code says that any Magistrate may take cognizance of an offence: (a) on receiving a complaint of facts, which constitute such offence; (b) upon a police report of such facts; and (c) upon information received from any person

other than a police officer or upon the Magistrate's own knowledge, that such an offence has been committed (See ***Anil Saran v. State of Bihar, 1995 SCC (Cri) 1051 : (1996 Cri LJ 408)***.

63 In the aforesaid context, I may refer to and rely upon a decision of the Supreme Court in the case of **Sunil Bharti Mittal vs. Central Bureau of Investigation** reported in **2015 (4) SCC 609**:

> *"40. It is stated at the cost of repetition that in the present case, while issuing summons against the appellants, the Special Magistrate has taken shelter under a so-called legal principle, which has turned out to be incorrect in law. He has not recorded his satisfaction by mentioning the role played by the appellants which would bring them within criminal net. In this behalf, it would be apt to note that the following observations of this Court in the case of* ***GHCL Employees Stock Option Trust v. India Infoline Ltd. (2013) 4 SCC 505 : (AIR 2013 SC 1433)****:*
>
> > *"19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against Respondents 2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them.* ***(Thermax Ltd. v. K.M. Johny, (2011 AIR SCW 5952)*** *followed)*
> >
> > *xx xx xx*
> >
> > *21. In the instant case the High Court has correctly noted that issuance of summons against respondents 2 to 7 is illegal and amounts to abuse of process of law. The order of the High Court, therefore, needs no interference by this Court."*
>
> *41. We have already mentioned above that even if the CBI did not implicate the appellants, if there was/is sufficient material on record to proceed against these persons as well, the Special Judge is duly empowered to take cognizance against these persons as well. Under Section 190 of the Code, any Magistrate of first class (and in those cases where Magistrate of the second class is specially empowered to do so) may take cognizance of any offence under the following three eventualities:*
>
> *(a) upon receiving a complaint of facts which constitute such offence;*
> *(b) upon a police report of such facts; and*

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(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

42. This Section which is the starting section of Chapter XIV is subject to the provisions of the said Chapter. The expression "taking cognizance" has not been defined in the Code. However, when the Magistrate applies his mind for proceeding under Sections 200-203 of the Code, he is said to have taken cognizance of an offence. This legal position is explained by this Court in ***S.K. Sinha, Chief Enforcement Officer vs. Videocon International Ltd and Ors. (2008) 2 SCC 492 : (AIR 2008 SC 1213)*** *in the following words:*

> *"19. The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of: and when used with reference to a court or a Judge, it connoted "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.*
>
> *20. "Taking Cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence...."*
>
> *Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the Court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not.*

45. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e., the complaint, examination of the

complainant and his witnesses if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

46. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori , the order would be bad-in-law if the reason given turns out to be ex facie incorrect.

48. However, there has to be a proper satisfaction in this behalf which should be duly recorded by the Special Judge on the basis of material on record. No such exercise is done. In this scenario, having regard to the aforesaid aspects coupled with the legal position explained above, it is difficult to sustain the impugned order dated 19.03.2013 in its present form insofar as it relates to implicating the appellants and summoning them as accused persons. The appeals arising out of SLP (Cri.) No. 2961 of 2013 and SLP (Cri.) No. 3161 of 2013 filed by Mr. Sunil Bharti Mittal and Ravi Ruia respectively are, accordingly, allowed and order summoning these appellants is set aside. The appeals arising out of SLP (Cri.) Nos. 3326-3327 of 2013 filed by Telecom Watchdog are dismissed.

64 I am not impressed by the submission canvassed on behalf of the writ applicant that public interest will suffer if the sitting Minister of a State is prosecuted. I am also not impressed by the submission on the question of *mala fide* on the part of the complainant in filing the complaint. I am unable to see any force in the contention that the complaint should be thrown over – board on the mere unsubstantiated plea of *mala fides.* Even assuming that the complainant has laid the complaint only on account of his personal animosity, that, by itself, will not be a ground to discard the complaint containing serious allegations which have to be tested and weighed after the evidence is collected. In

this connection, the following view expressed by Bhagwati, C.J., in **Sheonandan Paswan v. State of Bihar (1987) 1 SCC 288 at page 318 : AIR 1987 SC 877 at p. 891,** may be referred to:

> *"It is a well established proposition of law that a criminal prosecution if otherwise justifiable and based upon adequate evidence does not become vitiated on account of mala fides or political vendetta of the first informant or the complainant.*
>
> *Beyond the above, we do not wish to add anything more."*

65 There is no merit in the contention that public interest will suffer if the Minister of State is prosecuted.

66 The Supreme Court said thus in **Kazi Lhendum Dorji vs. Central Bureau of Investigation [1994 SCC (Crl.) 873]**:

> *"Having regard to the seriousness of the allegations of corruption that have been made against a person holding public office of Chief Minister in the State which have cast a cloud on his integrity, it is of utmost importance that the truth of these allegations is judicially determined. Such a course would subserve public interest and public morality because the Chief Minister of a State should not function under a cloud. It would also be in the interest of respondent 4 to have his honour vindicated by establishing that the allegations are not true. The cause of justice would, therefore, be better served by permitting the petitioner to agitate the issues raised by him in the writ petition than by non-suiting him on the ground of laches."*

67 It is worthwhile, in this connection, to recall what the Supreme Court said in **Kartar Singh vs. State of Punjab (1994) 3 SCC 569** in para 381:

> *"Equally true that in the midst of clash of interests, the individual interest would be subservient to social interest, yet so long as ubi, jus, ebi remedium is available the procedure prescribed and the actions taken thereon by the law enforcement authority must meet the test of the Constitutional mandates."*

68 In the overall view of the matter, I have reached to the conclusion that no case is made out for interference. Let me clarify that the pre-charge evidence is being recorded by the Special Judge. As noted above, even at the stage of recording of the pre-charge evidence, it is open for the accused persons to cross-examine the witnesses. At the end of recording of the pre-charge evidence, if the writ applicants are of the view that no case is made out for the purpose of framing of the charge, they can prefer an appropriate application for discharge under the provisions of Section 245 of the Code. However, at this stage, I do not see any good ground to interfere with the impugned order.

69 The linch-pin to the administration of the Criminal Justice is speedy conclusion of the criminal trials. Obligation of the different wings of this criminal justice delivery system is that each one of them should discharge its role with sincerity and utmost expedience. This concept is legislatively recognised in the provisions of the Act. The provisions of Section 19(3) of the Act sufficiently indicate the legislative intent for the expeditious disposal of trials under the Act as well as the need for least interference by the higher Courts. It indicates that the Courts while exercising writ / revisional jurisdiction would also not grant stay of the proceedings. Where-ever a stay is to be granted on the ground of any error, omission or irregularity in the sanction granted by the authority, the Court would not do so unless It was satisfied that such error or omission or irregularity has resulted in failure of justice. In addition to these provisions the Legislature laid specific emphasis in Section 4(4) of the Act by stipulating therein that notwithstanding anything contained in the Code of Criminal Procedure, a Special Judge shall, as far as practicable hold the trial of an offence on day-to-day basis. This legislative intent was clearly spelled out by the Courts in various judicial pronouncements with definite emphasis on need for expeditious

disposal. These provisions sufficiently indicate the intention of the Legislature and also the object of the Act that cases of corruption shall be tried speedily and completed as early as possible. This is the policy of the Act and it underlies Section 3 also.

70 The acceptance of the contentions raised by the writ applicants at this stage would tantamount to giving a very microcosm approach to the legislative scheme of the Act and their application in relation to the offences triable under this special Act. Such offences are not misdemeanour that they could be ignored merely on the ground of inconvenience or motivated institution, understood in its vague terms. The Court should adopt pervasive approach which would further the cause and object of the Act and require an offender to face the process of law. [see : ***Parkash Singh Badal and another vs. State of Punjab and others, (2004) 4 AICLR 909].***

71 I conclude this judgment with a famous quote of *Ayn Rand,* a Russian–American writer and philosopher, in one of her best selling novels namely "**Atlas Shrugged"** as under:

> *"When you see that trading is done, not by consent, but by compulsion – when you see that in order to produce, you need to obtain permission from men who produce nothing – when you see that money is flowing to those who deal, not in goods, but in favors – when you see that men get richer by graft and by pull than by work, and your Laws don't protect you against them, but protect them against you – when you see corruption being rewarded and honesty becoming a self-sacrifice – you may know that your society is doomed."*

72 In view of the above, all the three petitions fail and are hereby

rejected. Notice stands discharged. Ad-interim relief, if any, granted stands vacated forthwith.

(J.B. PARDIWALA, J.)

FURTHER ORDER

After the judgment is pronounced, Mr. Virat Popat, the learned counsel appearing for the writ applicant of the Special Criminal Applications Nos.207 of 2016 and 8971 of 2017 respectively pointed out that there is a non-bailable warrant issued by this Court against his client and the same has been stayed by this Court from its operation. The non-bailable warrant is ordered to be converted to a bailable warrant of the sum of Rs.25,000/- (Rupees Twenty Five Thousand only). The accused shall appear before the Special Court and furnish the bail accordingly. I have already said in my judgment that it shall be open for the accused persons to prefer an appropriate application seeking exemption from personal appearance before the Special Court at the time of recording of the pre-charge evidence. If any such application is filed by any of the accused persons, the Special Court concerned may look into the same in accordance with law. The writ applicant before this Court shall appear before the Special Court within a period of two weeks from today.

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(J.B.PARDIWALA, J)

CHANDRESH