



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CRIMINAL APPELLATE JURISDICTION**  
**CRIMINAL APPLICATION NO.1311 OF 2018**

UPS Madan .. Applicant  
Versus  
State of Maharashtra & Anr .. Respondents

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Mr. D.J. Khambata, Sr. Advocate with Shardul Singh for the applicant.

Mr. Deepak Thakare, P.P with Mr.K.V. Saste, APP for the State.

Mr. Aditya Pratap for respondent no.2.

**CORAM: RANJIT V. MORE &  
SMT. BHARATI H.DANGRE, JJ.**

**DATED : 22<sup>nd</sup> APRIL 2019**

**JUDGMENT :- (Per Smt. Bharati Dangre, J)**

1 By the present application, the Chief Secretary of State of Maharashtra has invoked the jurisdiction of this Court praying for quashing and setting aside the impugned order passed by the learned Special Judge (under Prevention of Corruption Act) for Greater Mumbai, on 25<sup>th</sup> October 2018, thereby directing the ACB, Mumbai to investigate the complaint filed by the Respondent no.2 under Section 156(3) of the Code of Criminal Procedure (for short 'the Code')

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2 We have heard learned senior counsel Shri Darius Khambatta appearing for the applicant, learned Public Prosecutor Shri Deepak Thakare along with Shri K.V. Saste for the State and Shri Aditya Pratap representing the complainant/respondent no.2.

The applicant, at the time of filing of the application, was holding the post of Additional Chief Secretary (Finance) of the State of Maharashtra. However, as on date, he is posted as the Chief Secretary of the State of Maharashtra. The applicant belongs to the IAS cadre and joined the Indian Administrative Services in the year 1983. It is not in dispute that he falls within the definition of public servant as defined under the Indian Penal Code for the purpose of Prevention of Corruption Act, 1988.

3 The grievance of the applicant revolves around the complaint which is filed by the respondent no.2 on 21<sup>st</sup> February 2018 in the Special Court seeking an investigation under Section 156(3) of the Code of Criminal Procedure by the Maharashtra State, Anti Corruption Bureau against the

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applicant for the alleged offences under Section 120B, 409 of the IPC and Section 13(1)(d) of the Prevention of Corruption Act. The said complaint was accompanied with several documents. The complainant alleged therein that particular land at Bandra Kurla Complex is developed by a Company known as Indian Film Combine Pvt. Ltd as a 'Drive-in- Theatre'. The allegation in the complaint is to the effect that the said Company is developing the Drive-in-theatre by utilizing the 2.0 Floor Space Index (FSI) and it is also proposing to carry out the construction of shops, hotels etc. on the said piece of land. The complaint alleges that according to the prevailing Rules and Regulations, it is permissible for the Company to develop the land in issue by utilizing only 1.0 FSI and without changing user of the said land distinct from a Drive-in-theatre. A positive assertion is made in the complaint that it is the applicant who is responsible for granting the permissions which has resulted into the Company obtaining pecuniary advantage by violating the norms relating to FSI and change of user in respect of the land in question. In order to establish the said allegation, the complainant alleges that originally for Bandra Kurla Complex,

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FSI of 1.0 was available and thereafter, the Central Government through Ministry of Environment and Finance issued a notification on 19<sup>th</sup> February 1991 that on and from the said date of the notification, in CRZ area, development would be permissible only to the extent permitted by Rules/Regulations in force as on date of the said notification and such development would be permitted without any change in user. The premise on which allegations are levelled in the complaint is the MOEF notification and it is alleged that FSI of 2.0 was not available for the land in issue and the land could be put to use only as a Drive-in-theatre.

Pursuant to the directive issued by the Hon'ble Apex Court in the case of *Priyanka Srivastava Vs. State of Uttar Pradesh*, the complaint is accompanied by a supporting affidavit sworn on 17<sup>th</sup> July 2018.

4 The said complaint/application preferred by the complainant was taken up for consideration by the Special Judge (Under the Prevention of Corruption Act) for Greater Mumbai, and it was numbered as ACB Miscellaneous

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Application No.238 of 2018. It is this order passed by the Special Judge on 25<sup>th</sup> October 2018 which is impugned in the present application before us. The learned Special Judge has taken into consideration the allegation set out in the complaint in relation to a plot of land admeasuring about 20 acres reserved for Drive-in-theatre situated at Bandra (East) Mumbai and leased to the Indian Film Combine Pvt.Ltd. The allegations in the complaint are relied by the learned Special Judge and it is noted that though the complainant had raised grievance before the concerned authorities for taking action, no action was taken. The Special Judge arrived at a conclusion that the offence against the respondent is serious in nature and calls for investigation in respect of the pecuniary advantage obtained by the accused without following the notification and the rules of development at the relevant time. In the backdrop of the aforesaid findings recorded, the Special Judge passed the following order :

*“Accused persons granted the FSI of '2' for the land. Accused without following the Notification and rules of development permitted huge construction to go on with the FSI of '2'. The FSI being used through an illegal change of use of land from drive-in-theatre to that of*

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*shopping mall, five-star hotel etc. thereby giving an illegal pecuniary gain to private developer to the tune of thousand of crore in one of the costliest areas of Mumbai i.e. the Bandra Kurla Complex. The petitioner have filed complaint before concerned authorities for taking action but no any action was taken. The offence against respondent is serious in nature and requires investigation in respect of pecuniary advantage to accused by accused no.1 without following Notification and rules of development at the relevant time”.*

5           The learned Senior counsel Shri Khambatta appearing for the applicant assails the impugned order on two counts viz. on the merits of the matter and his attempt is to demonstrate that the complaint is ex-facie false and frivolous. He would rely upon a series of documents to demonstrate that the factual assertion made in the complaint is incorrect and is a distorted version. The second count on which the impugned order is assailed is the ground of want of sanction as as contemplated by the Maharashtra Amendment to Section 156(3) of the Code of Criminal Procedure brought into effect by the Maharashtra Act No.33 of 2016. In light of the said amendment, the learned senior counsel would submit that it was not permissible for the Magistrate to order an investigation against the applicant except with the previous sanction under

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Section 197 of the Code or under any other law for the time being in force. He further submits that the respondent no.2 being conscious of this fact had approached for sanction to the Hon'ble President of India and has asserted in the complaint that there is a deeming sanction in light of the proviso to the amendment to Section 156(3) of the Code as applicable to the State of Maharashtra. As far as the factual aspects of the matter are concerned, Shri Khambatta would submit that the MMRDA was appointed as the planning authority for the Bandra Kurla Complex and the planning proposals were submitted by MMRDA to the State Government who had accorded its approval to the General Development Control Regulations (GDCR) for Bandra Kurla Complex (BKC). Shri Khambatta has invited our attention to the said Regulations which reflect that the FSI permissible for commercial development in BKC from 1971 was 2.0. He would further submit that the land in question falls within 'E' block of the planning proposal. He would also invite our attention to the lease deed executed pursuant to a tender notice for period of 99 years and would invite our attention to the various covenants of the said lease

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deed which would reveal that the user of the land in question was also for other activities other than the Drive-in- theatre and would extend to a First Class Restaurant, Bar, Candy shop, petrol pump etc. On the basis of the said documents placed before us, Shri Khambatta would urge that on merits of the matter also, the FSI of 2.0 is available and the use of commercial activities was already contemplated in terms of the lease deed executed in the year 1991 itself. He would thus submit that perusal of the public documents would conclusively demonstrate that the entire facade of the complainant is misconceived.

Shri Khambatta would also submit that the power under Section 156(3) conferred on a Magistrate has to be exercised with great care and caution and time and again, Hon'ble Apex court as well as this Court was required to take cognizance of the blatant abuse and exercise of discretion by the Magistrate and in light of the apprehended misuse of said power, and a settled position of law has emerged to the effect that the application of mind by the Magistrate while exercising the power should be reflected in the order. A mere statement

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that he has gone through the complaint, documents and heard the complainant would not be sufficient. Shri Khambatta has seriously criticized the impugned order inasmuch as he submits that the Magistrate has merely reproduced the allegation contained in the complaint and the impugned order lacks any attribute application of mind by the Magistrate so much so that he has not even cursorily gone through the documents accompanying the complaint itself.

In light of the factual assertion, Shri Khambatta would submit that the impugned order deserves to be quashed and set aside as the Magistrate has directed the investigation without any application of mind and such a trend and exercise of power is to be highly condemned.

In the alternative, Shri Khambatta has also invited our attention to the fact that from the year 1987 to 1999, the applicant had no concern with MMRDA and it was only in the year 2000-2002, he worked in MMRDA but was assigned to the Project Division as a Project Director and he was then appointed as Commissioner of MMRDA in the year 2013. In such circumstances, he would submit that there is no material

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placed on record by the complainant to demonstrate that the applicant had taken any particular decision which would, in any manner, violate the notification issued by the Ministry of Environment and Forest or any of the Development Control Regulation, much less the GDCR. He would also submit that the very land has itself been a subject matter of Public Interest Litigation (L) No.83 of 2018 filed by one Mrs.Abha Singh and Mr.Santosh Daundkar and he informs the Court that the said PIL has been dismissed by this Court.

6 As against the said submission, the learned counsel for the complainant/respondent no.2 herein Mr.Aditya Pratap who supports the impugned order and submits that the exhaustive complaint preferred by the complainant gives the details of the misconduct as contemplated under Section 13(2) of the Prevention of Corruption Act. He submits that this involves a large scale fraud and there are several persons of high ranking and influential in position involved in the same and it is only when the complaint would be investigated by the police machinery, veil would be lifted. Shri Pratap would also

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place reliance on the CRZ notification issued on 19<sup>th</sup> February 1991 and he submits that the applicant who was working in the capacity of Commissioner, MMRDA was the competent authority to grant FSI in areas under the control of MMRDA. He submits that the MOEF notification dated 19<sup>th</sup> February 1991 made it imperative that the FSI admissible on the date of notification would prevail and there would be no change of user and on that date, except for FSI required to construct the Drive-in-theatre, no other FSI was available and the land was purported to be used only as a Drive-in-theatre. Shri Pratap would positively assert that the applicant had permitted huge construction to go on with an FSI of 2.0, being used through an illegal change of use of land from driving theatre to that of a Shopping Mall, 5 Star Hotels etc. thereby giving an illegal pecuniary gain to the private developer to the tune of thousands of crores in one of the costliest areas of Mumbai.

He would also place reliance on the NOC issued by the Urban Development Department, Government of Maharashtra on 6<sup>th</sup> August 1999 which stipulate that in CRZ-II area, the development is permitted as per DCR prevailing on

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19<sup>th</sup> February 1991. He would thus allege that it is the applicant who had flouted the aforesaid orders though being aware of the provisions of law and the existing notification. Shri Pratap would thus allege misconduct on part of the applicant, thereby attracting Section 13(1)(d) of the Prevention of Corruption Act. He would also allege that the act of the applicant would invoke and apply Section 409 of the IPC since it is the breach of trust on the part of the applicant in granting illegal FSI enabling the private persons to avail built up area, many more times on the land against the one which is permitted.

As far as the objection of obtaining sanction in light of the Maharashtra Amendment is concerned, Shri Pratap would submit that since the offence under reference was under the Prevention of Corruption Act, 1988 under Section 19 of the said Act, the complainant had preferred an application to the President of India to accord sanction before ordering investigation and he has placed that application on record. According to Shri Pratap, the said application was made on 27<sup>th</sup> October 2017 and more than 90 days have lapsed and since no

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reply is received from the President, relying on the proviso to Section 156(3) of the Code of Criminal Procedure of the Maharashtra Amendment, he submits that the sanction is deemed to have been granted. He would also further submit that the requirement of sanction emanates from Section 19 of the Prevention of Corruption Act and not under Section 197 of the Code of Criminal Procedure and for making the said submission, he falls back on Section 4 of the Code of Criminal Procedure.

Learned counsel Shri Aditya Pratap placed heavy reliance on the following judgments of the Hon'ble Apex court :

- 1) *Laksmansingh Himatsingh Vaghela Vs. Naresh Kumar Chandrashanker Jha & Ors,*  
*AIR 1990 SC 1976.*
- 2) *Narayana Swamy Vs. State of Karnataka and ors.*  
*AIR 2016 (4) SC 125*
- 3) *Ajoy Archarya Vs. State Bureau of Investigation*  
*2013 AD (SC) 125*
- 4) *Abhay Singh Chautala Vs. CBI*  
*2011 (2) ACR 2252 (SC)*

7 With the assistance of the learned counsel for the parties, we have perused the said complaint along with its

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annexures and we have also considered the submissions advanced on behalf of the respective counsel. At the outset, we must take note of the amendment in Section 156(3) inserted in the Code of Criminal Procedure by way of Maharashtra Act No.33 of 2016. The said amendment inserts a proviso after sub-section (3) of Section 156 which reads thus :

*“Provided that, no Magistrate shall order an investigation under this section against a person who is or was a public servant as defined under any other law for the time being in force, in respect of the act done by such public servant while acting or purporting to act in the discharge of his official duties, except with the previous sanction under section 197 of the Code of Criminal Procedure, 1973 or under any law for the time being in force :*

*Provided further that, the sanctioning authority shall take a decision within a period of ninety days from the date of the receipt of the proposal for sanction and in case the sanctioning authority fails to take the decision within the said stipulated period of ninety days, the sanction shall be deemed to have been accorded by the sanctioning authority”*

8 Section 156 of the Code relates to the Police Officer's power to investigate a cognizable offence and it confers the power on the officer-in-charge of a police station, who may without order of the Magistrate investigate any cognizable case with a court having jurisdiction over the local

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*cases. This Court in Maksud Saiyed case (supra) examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under [Section 156\(3\)](#) and held that where a jurisdiction is exercised on a complaint filed in terms of [Section 156\(3\)](#) or [Section 200](#) Cr.P.C., the Magistrate is required to apply his mind, in such a case, the Special Judge / Magistrate cannot refer the matter under [Section 156\(3\)](#) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under [Section 156\(3\)](#) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.*

The power conferred was examined in light of Section 19(1) of the Public Accountability (Vigilance and Prevention of Corruption Act, 1988), the Apex Court held that the sanction as contemplated under Section 19(1) is a pre-condition for ordering investigation against public servant under Section 156(3) of the Code even at pre-cognizance stage. On the said point, we deem it appropriate to refer to the observations by their Lordships in the following words :-

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*That the requirement of sanction is only procedural in nature and hence, directory or else [Section 19\(3\)](#) would be rendered otiose. We find it difficult to accept that contention. Sub-section (3) of [Section 19](#) has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under [Section 156\(3\)](#) Cr.P.C. The above legal position, as already indicated, has been clearly spelt out in *Paras Nath Singh* and *Subramaniam Swamy* cases (*supra*).*

*14. Further, this Court in Criminal Appeal No. 257 of 2011 in the case of [General Officer, Commanding v. CBI](#) and opined as follows:*

*“Thus, in view of the above, the law on the issue of sanction can be summarized to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him..... If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio.”*

The exercise of power of the Magistrate again fell for consideration before the Hon'ble Apex Court, this time as a matter of serious concern. In case of *Priyanka Srivastava And Anr Vs. State of Uttar Pradesh and ors*,<sup>2</sup> Their Lordships were constrained to reiterate the duties and the approach of the Magistrate while exercising the powers under Section 156(3) and reiterated that the Magistrate exercising the said power is expected to be vigilant with regard to the nature of allegation made in the application and not to issue directions without proper application of mind. It was also cautioned that the said power cannot be invoked by a litigant at his own whims to harass others but it must be retained as a power which can be exercised only on a complaint by a principled and a really agreed citizen approaching the Court with clean hands and this power should be exercised only where it could be conducive to justice. The directives therefore came to be issued to file an affidavit supporting the allegations and we would gainfully refer to the observations of the Hon'ble Apex Court in paragraph nos.30 and 31.

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<sup>2</sup> (2015) 6 SCC 287



30. *In our considered opinion, a stage has come in this country where [Section 156\(3\)](#) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under [Article 226](#) of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.*

31 *We have already indicated that there has to be prior applications under [Section 154\(1\)](#) and [154\(3\)](#) while filing a petition under [Section 156\(3\)](#). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under [Section 156\(3\)](#) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under [Section 156\(3\)](#). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute /family disputes, commercial*



*offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.*

9           It is in this backdrop, the State of Maharashtra has amended and inserted the proviso to section 156(3) of the Code. By the same amendment, Section 190 of the Code of Criminal Procedure was also parallelly amended by inserting identical proviso restraining the Magistrate from taking cognizance from any offence alleged to have been committed by a person who is or was a public servant, while acting or purporting to act in discharge of official duty except with previous sanction under Section 197 of the Code of Criminal Procedure or under any law for the time being in force. By the said amendment, a restraint has been imposed in directing an investigation by the Magistrate by virtue of the proviso initiated in Section 156(3) and in the power of the Magistrate taking cognizance by the proviso inserted in Section 190. By virtue of the said amendment, no complaint can be filed against public offences without a valid sanction from the competent authority.

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The object of the Maharashtra Amendment aims to protect the public officials against false and frivolous and politically motivated cases. The observations of the Hon'ble Apex court which we have referred to above, are clearly indicative of the trend of misuse of the said power in case where the complaint is bereft of any truth, it would result in demoralizing public officials/public servants from exercising their powers bonafidely and it would result in the huge harassment and unless and until the entire rigmarole of the proceedings is undergone, there can be no solace to an honest public official who is purported to exercise his duty fearlessly and effectively. By the amendment inserted in the year 2016, it is not competent for a Magistrate to order an investigation under Section 156(3) on a complaint against the public servant in absence of any previous sanction under Section 197 of the Code of Criminal Procedure. Shri Pratap has submitted that he has applied for sanction to the President of India and there is a deeming sanction.

10 We have noted that the applicant is presently working as a Chief Secretary of the State of Maharashtra and he

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came to be transferred from the post of Commissioner, MMRDA to the post of Additional Chief Secretary, Finance Department, by an order dated 5<sup>th</sup> May 2018 passed by Government Administrative Department under the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005. Shri Pratap has himself tendered the said order dated 5<sup>th</sup> May 2018 in the compilation submitted by him. The said order is reflective of the fact that the applicant is in the Indian Administrative Service. As an officer of the Indian Administrative cadre, appointing authority of the applicant is the President of India. However, when the applicant is appointed in connection with the affairs of the State, in such contingency, he worked under the control of the State Government and the applicant in the said capacity cannot be removed from his office save by or with the sanction of the State Government and it is the State Government which is the appropriate authority from whom the contemplated sanction ought to be obtained. The applicant was holding the post of Commissioner of MMRDA from 2013 . The MMRDA is a body of Government of Maharashtra which is responsible for

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infrastructure development of the Mumbai Metropolitan Region. It is the body which is set up under the Mumbai Metropolitan Region Development Authority Act, 1974 as the Apex body for planning and coordination of development activities in the region. MMRDA is thus a functionary of the State Government and the applicant was holding charge of Commissioner of the MMDRA and exercising the power conferred on him. There is no dispute that the applicant is a public servant and in such circumstances, the first proviso of Section 156(3) is attracted.

Reliance placed by Shri Pratap on the judgment is not of any assistance to him since the said judgment do not take into consideration the Maharashtra Amendment to Section 156(3) of the Code of Criminal Procedure. The said judgments are delivered in the context of Section 197 and we need not take into consideration the said judgments which lay down a proposition of law to the effect as to who is the sanctioning authority. In case of *Laksmansingh Vaghela Vs. Naresh Kumar C. Jha & ors*<sup>3</sup>, the issue before the Hon'ble Apex Court

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<sup>3</sup> AIR 1990 SC 1976

was when the offence can be said to be the one committed while acting or purporting to act in discharge of his official duty and the Apex Court held that Section 197 of the Code of Criminal Procedure clearly intends to draw a line between public servant and to provide that only in case of a higher rank, the sanction of the Government to their prosecution would be necessary. The words “removable from office” occurring in Section 197 also fell for interpretation and it was held that it signified removal from the office he his holding and thus the authority was defined as an authority under whom the officer is serving and who is competent to terminate his services. The issue involved was also whether in case of a person/accused who is in service and pay of the local authority whether his status would stand altered.

11 In case of *Ajoy Acharya Vs. State Bureau of Investigation against Economic Offence*<sup>4</sup>, the Hon'ble Apex Court was dealing with an accused charged with Sections 409, 406, 467, 468 and 120B and 13(1)(d) and 13(2) of the

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Prevention of Corruption Act who came to be nominated as Director on the Madhya Pradesh Industrial Development Corporation and investigation was ordered into the affairs of the said Corporation by the State Government. The appellant before the Appellate Court was an IAS officer of 1976 batch and while holding the charge of post of Commissioner of Industries of State of Madhya Pradesh, he came to be nominated as Director of MPSIDC. He continued to hold the post till the year 1998 and since then, he came to be transferred from the post of Commissioner of Industries, he ceased to be a member of the Board of Directors of MPSIDC. The question which fell for consideration before the Apex Court was when an accused was holding plurality of offices, each of which makes him a public servant, where a sanction is essential from each of the competent authority and it was held that the sanction would be necessary only from the competent authority of the office which he had allegedly misused. Conclusively, it was held in the facts of the case that since the appellant was not holding the public office which he is alleged to have misused when the first charge-sheet was filed, there was no need to obtain any

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sanction before proceeding to prosecute him for the offences alleged. Now the similar issue do not arise at all. We fail to understand how the authoritative pronouncement by the Hon'ble Apex Court in the aforesaid judgment is of any succor to the learned counsel representing the complainant. Here is a clean and clear case where the applicant was working as Commissioner of MMRDA which is a wing of the Government and later on, transferred to the post of Additional Chief Secretary of State of Maharashtra. The impugned order is passed by the Magistrate on 25<sup>th</sup> October 2018 when he was holding the post of Additional Chief Secretary (Finance), State of Maharashtra. It was therefore incumbent upon the Magistrate to abide by the proviso inserted in Section 156(3) by the Maharashtra Amendment and without obtaining the said sanction, the investigation could not have been ordered. The impugned order which is passed in ignorance of the said provision is, therefore, non-est and liable to be struck down.

12 We have also examined the merits of the complaint preferred by the respondent no.2. The core allegation in the

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said complaint in relation in relation to the FSI and it is projected in the said complaint that the present applicant permitted huge construction with an FSI of 2.0 and this FSI was being sought to be used through an illegal change of use of land from 'drive-in-theatre' to that of shopping mall, Five Star Hotel etc and this resulted in illegal pecuniary gain to the private developers to the tune of thousands of crores in a prime locality in the financial capital of the country. The complaint has further alleged that the Coastal Regulation Zone Notification 1991 had clearly indicated that all development activities proposed to be taken in the area will have to adhere to the norms as existing on 19<sup>th</sup> February 1991 including the norms pertaining to FSI. It is alleged that the land under Reference is in CRZ area and necessarily had to be developed as per the ruling prevailing on 19<sup>th</sup> February 1991 and despite being aware of this legal scenario when there was no FSI of '2.0' available for a drive-in-theatre and the permission was only to construct a drive-in-theatre, the availment of FSI of 2.0 FSI is illegal. It is therefore, alleged that the applicant has committed an offence of criminal misconduct by according large pecuniary

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favour to the accused nos.2 and 3 and therefore, offence under Section 13(1)(d) of the Prevention of Corruption Act has been committed.

Though we are prima facie satisfied and expressly observed in the above paragraphs that the investigation could not have been ordered by the Magistrate in absence of the compliance of the proviso inserted in sub-section (3) of Section 156 of the Code of Criminal Procedure as applicable to the State of Maharashtra, we have also considered the merits of the allegation contained in the complaint. The entire case as set out in the complaint is that the said land at Bandra Kurla Complex to which a reference has been made was being developed as 'drive-in-theatre' by using 2.0 FSI, whereas what was permissible was an FSI of 1.0. The factual disclosure reveal that the Urban Development Department itself had clarified its decision to confer the FSI of 2.0 and on the relevant date of the MOEF notification, the existing FSI was permitted. As on 19<sup>th</sup> February 1991, the GDCR was applicable and for commercial development, it permitted an FSI of 2.0. The lease deed dated 19<sup>th</sup> February 1991 in favour of the Indian Film Combine

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Pvt.Ltd is also placed on record which would establish that the user of the land in issue was for activities other than which is a drive-in-theatre and it permitted its user as restaurant, bar, petrol pump etc. A communication dated 15<sup>th</sup> July 1999 issued by the Collector is also placed on record which contemplates the said user. Further, an order is issued on 19<sup>th</sup> August 1999 by the State Government in terms of the DCR of 1991 and it is applicable for redevelopment of drive-in-theatre also clarify that in redevelopment proposal hotel user shall be permissible, subject to the relevant rules and regulations and the redevelopment would not amount to deviation of land user proposal of the Bandra Kurla Complex. In such circumstances, since on the relevant date, both FSI 2.0 and commercial user was admissible and permissible, we find that the complaint is misfounded and is nothing but a distortion of the factual and legal position with regard to the land in question in issue as on the date of the MOEF Notification. In such circumstances, the impugned order passed by the authority passed by the Special Judge proceeding on the basis of the complaint, without verification or application of mind to the facts placed before

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him, in light of the documents produced by the complainant himself, in our view cannot be sustained in law and the impugned order, therefore, deserves to be quashed and set aside.

For the reasons recorded above, Criminal Application is allowed. The impugned order dated 25<sup>th</sup> October 2018 passed by the learned Special Judge (Under the Prevention of Corruption Act) for Greater Mumbai, at Mumbai in ACB Miscellaneous Application No.258 of 2018 is quashed and set aside.

No order as to costs.

**(SMT. BHARATI H. DANGRE, J.)**

**(RANJIT V. MORE J.)**