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Sanction for prosecution – Is it a pre-requisite for referring the matter for investigation U/S 156(3) OF CRPC.

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Public servants, by their very office, are treated to be a separate class in application of laws. They discharge public duties and as such are not be exposed for vexatious criminal actions, least public work becomes a casualty. It is for this reason, in several statutes a protection is created for such public servants. The protection is provided in the nature of prior 'Sanction for Prosecution' of a public servant and the power is granted to an authority who is empowered to remove such public servant from his office. For the present write up, sanction for prosecutionas provided under Prevention of Corruption Act, 1988 alone is taken.

1. <u>The Scope & Object of Sanction For Prosecution of a Public Servant.</u>

1.1 The Concept of Sanction for Prosecution finds its place in several statutes enacted by the Parliament as well as the State Legislature. The Public Servants who occupy various public posts are given this protection from exposing themselves to vexatious criminal prosecutions.

1.2 The requirement of Sanction to Prosecute any Public Servant for offences under Prevention of Corruption Act, 1988 was provided for in Section 19 of the Act. As it is originally stood, the protection under Section 19 was available to such Public Servant while in service only. Whereas, Section 197 of CrPC covered Public Servants during their service and after their retirement as well. Section 19 came to be amended by Amendment Act of 2018 specifying that the aspect of protection would now extend to the Public Servants even after they demitting such public office. This clearly signifies the true intention of the framers of law being, protection of sanction must be available to public servants irrespective of whether they are in service or have retired.The focal point being safeguarding the persons who are discharging public functions.

1.3 The proviso to the Amended Section 19 prescribes the mode and manner in which a request for grant of sanction can be made. The said proviso starts with the words – *"No person can request for sanction..."*. The proviso is thus negatively worded prescribing that no other person except a person connected with the Law Enforcing/Investigating Agency can seek sanction. The proviso further stipulates that in order to make a request for grant of sanction by a Private Person/Complainant there has to be a complaint which has been filed before the Competent Court and the said Complaint has not been dismissed under Section 203 of CrPC and further that the court has directed such Complainant to obtain Sanction for Prosecution to proceed further in the case. All

these embargoes, conditions and stipulations demonstrate that the law makers in their wisdom have thought it fit to discourage Private Complainants from hoisting criminal cases against the public servants.

1.4 The aspect of Sanction is of paramount importance and touches upon the very jurisdiction of the Court. The object being protection to the Public Servant, the requirement of Sanction at any stage of the criminal case cannot be diluted or dispensed with.

2. Requirement Of Sanction – At What Stage/s ?

2.1 Sanction is a prohibition upon the Court and not on the Complainant. Whenever the Court is called upon to look into any allegation of commission of offences under the Prevention of Corruption Act, 1988, or certain offences under Indian Penal Code concerning the Public Servants, Section 19 of the Prevention of Corruption Act, 1988 as well as Section 197 of CrPC makes it mandatory upon the Court to assume jurisdiction only upon there being a valid Sanction for Prosecuting such public servant. In other words, in the absence of Sanction, Court would not have the requisite jurisdiction to proceed in the matter.

2.2 Section 19 of Prevention of Corruption Act, 1988 as well as Section 197 of CrPC clearly prescribes that no Court shall take cognizance of the offences without a valid Sanction. This bar is imposed by the statute '**AT THE TIME OF TAKING COGNIZANCE'.**

2.3 The proviso of amended Section 19 of Prevention Of Corruption Act, 1988 in respect of a Private Complaint now makes it mandatory to direct the Complainant to obtain Sanction from Competent Authority in case such Complaint has not been dismissed under Section 203 of CrPC. This means that in respect of a Private Complaint the Court can take cognizance, record sworn statement of the Complainant and Witnesses if any, apply its mind to all the materials before it : and in case the court finds that the Complaint need not be dismissed under Section 203 of CrPC, as it makes out sufficient grounds to proceed further, the Court shall stop at that stage and direct the complainant to obtain sanction for proceeding further in the matter. In other words, in this scenario the sanction for prosecution is necessary even '**AFTER TAKING OF COGNIZANCE'**but before proceeding further under section 204 of Crpcie. before summoning of the accused person/s.

2.4 Another scenario wherein the Court is called upon to look into the offences committed by a Public Servant is when a Private Complaint is filed with a request to refer the matter for investigation under Section 156(3) of CrPC. At this stage the Court is applying its mind only to refer the matter for investigation. However, the application of judicial mind is nevertheless a mandatory consideration. As held by the Hon'ble Apex Court in *Anil Kumar v. M.K. Aiyappa*(2013) 10 SCC 705, no court can refer a Private Complaint for Investigation under Section 156(3) of CrPC unless such Complaint is accompanied with a valid Sanction Order. This scenario though does not come out of any statute nevertheless is equally applicable and binding on all courts within the territory of India as prescribed under Article 141 of Constitution of India. What it essentially means is, that even for a reference under Section 156(3) of CrPC the requirement of sanction is mandatory and therefore sanction is needed even **'BEFORETHE STAGE OF COGNIZANCE**'.

2.5 As could be seen from the above, sanction for prosecution is mandatory either **"BEFORE"** or **"AT"** or "**AFTER"** taking of cognizance.

3. Analysis Of Various Judgements – in support & against the want of sanction for referring a complaint for investigation

3.3 ***R.R. Chari v. State of Utter Pradesh***
AIR 1951 SC 207 – (Para 10-11)

The Judgement was passed by a bench constituting of three Hon'ble Judges of the Apex Court. The offences alleged against the Public Servant were under Section 161 and 165 of Indian Penal Code. The basic contention urged therein was that the Order of the Magistrate issuing warrant for the arrest of the Public Servant concerned at the investigation stage amounted to the Court taking cognizance of the offence in the absence of a valid Sanction for Prosecution. The proceedings had to be held as illegal. The Apex Court negatived the said contention upon considering the fact that when the actual cognizance was taken and the summons was issued to Accused therein, the Competent Authority had granted the required Sanction for Prosecution. This particular view of the apex court has been put forward against the contention for want of sanction at the stage of reference order on the score that it has been passed by a bench of three judges and the MK Ayiappa case is by a bench of two judges & further without referring this case.And, the view taken in MK Ayiappamust be held to be *per incurium*. However, it is to be noted that, the question regarding the requirement of Sanction at the stage of referring the matter for investigation under Section 156(3) of CrPC was neither framed nor directly fell for

consideration before the Supreme Court in the above case, whereas, the direct question considered and answered by the apex court in MK Ayiappa case.

3.3***DevarapalliLaxminarayana Reddy &ors v. Narayana Reddy &Ors***
(1976) 3 SCC 552 – (Para 17)
This Judgment was rendered by a bench of three Judges. The question that was specifically framed and answered in the case was whether in view of clause (a) of the first proviso to Section 202(1) of CrPC, a Magistrate who receives a Complaint disclosing an Offence exclusively triable by the Court of Sessions is debarred from sending the same to the police for investigation under Section 156(3) of CrPC. While deliberating on the issue before it the Apex Court held that the power to order investigation under Section 156(3) of CrPC is different from the power conferred under Section 202(1) of CrPC. The two operate in distinct spheres at different stages. The first is exercisable at the pre cognizance stage while the second at post cognizance stage when the court is in seisin of the case. The magistrate who ones has taken cognizance of the offences under Section 190 of CrPC cannot thereafter exercise his powers under Section 156(3) of CrPC. Here again, the aspect of sanction qua exercise of power under Section 156(3) off CrPC was never considered or answered by the Hon'ble Apex Court. The finding rendered in the above case was held to be a bad law and thus overruled by the Apex Court in *VinuBhaiHaribhaiMalaviya v. State of Gujarat* reported in (2019) 17 SCC 01 by a bench consisting of three Judges.

3.3***Anil Kumar V. M.K. Aiyappa***
(2013) 2 SCC 183 – (Para 15-22)

This judgement was rendered by a bench consisting of two Judges. The specific question framed was whether the Special Judge/Magistrate is justified in referring a Private Complaint made under section 200 of CrPC for investigation by the police in exercise of powers conferred under Section 156(3) of CrPC without the production of a valid Sanction Order under Section 19 of Prevention of Corruption Act, 1988. After considering various judgements of the Apex Court, the bench held that the recruitment of Sanction is a precondition for ordering investigation under section 156(3) of CrPC against public servant even at pre- cognizance stage.

3.4 ***ManjuSurana v. SunilArora***
(2018) 5 SCC 557 – (Para 30, 32, 33, 43 & 47)
The matter was considered by a bench of two Judges of the Apex Court. It is pertinent to note that the Apex Court bestowed its attention to the judgments of three Judges bench in (1) *RR Chari*, (2) *Gopaldas Sindhi*, (3) *Jamuna Singh*, (4) *Nirmajit Singh Hoon*, (6) *Devarapalli* and such other judgments rendered by the Supreme Court. After carefully considering all the judgments referred to supra, the Apex Court referred the matter to a larger bench and the issue regarding the want of Sanction for or at the stage of referring the matter for investigation under section 156(3) of CrPC is pending consideration before the larger bench of the Apex Court. It is relevant to point out that the Apex Court did not hold the law laid down in *Anil Kumar v. Aiyappa*by the coordinate bench asper incuriam or bad law in the light of the judgments rendered by three judges of Supreme Court in R.R. Chari and other cases.

3.5 **a) *Mohammed v. State of Karnataka &Ors* – Division Bench, Kerala High Court.**
O.P. (Crl.) No. 98/2018, Decided on 12/12/2018
b) *Dr.Nazarul Islam v. Basudeb Banerjee &ors*
(2022) SCC Online Cal 183 – (Para 34-36)
c) *Anil Kumar B.H. v. Lokayuktha Police*
W.P. No. 24574/2013, decided on 25/11/2021
(2022) 2 Kar.LJ 80

In all the above matters the respective courts while considering the question of requirement of Sanction at the stage of exercising powers under section 156(3) of CrPC, upon analysing the reference to larger bench made in Manju Surana case, have unequivocally held that Sanction is a pre-requisite without which or in the absence of which the court would not be empowered to exercise powers under section 156(3) as has been held by the Apex Court in *Anil Kumar v. M K Aiyappa.*

3.6 ***Javed Ahmed Abdul Hamid Pawala v. State of Maharastra***
(1985) 1 SCC 275 – (Para – 4)

While considering the question whether a division bench of three Judges can purport to overrule the judgement of division bench of two Judges merely because three is larger than two, the apex court has held that it may be inappropriate for a division bench of three Judges to overrule the decision of division bench of two Judges as the Apex Court sits in the divisions of two and three Judges for the sake of convenience only and therefore the power to overrule can be exercised by a full bench or a constitutional bench specifically constituted for the purpose.

3.7 **TJ Abraham v. State of Karnataka & Others**
Criminal Petition No. 5659 / 2021
2022 SCC Online KAR 1604

In this case the complaint filed with a request to refer the matter for investigation had been rejected for want of sanction as per the principle enunciated in MK Aiyappa case. When challenged by the private complainant before the High Court, the Court after considering RR Chari &Devarapalli dictum, held MK Aiyappa to be bad law. It further observed that no sanction is required at the time of referring the matter for investigation. This judgement of the High Court is presently under challenge before the apex court. It is being now being debated whether High Court could have held MK Aiyappa of apex court to be bad law when the same was not said so by the coordinate bench of apex court.

4.THE LAW THAT NEEDS TO BE FOLLOWED AT THE PRESENT REGARDING SANCTION QUA REFERENCE UNDER SECTION 156(3) OF CrPC.

4.1 It is being argued by agencies / private complainants that the law laid down by the Apex Court in *Anil Kumar v. M K Aiyappa*may not be the correct approach in the light of earlier judgements of the Apex Court by a bench consisting of three Judges in *RR Chari &Devarapalli.* The said argumentdo not hold much water as after considering the same judgements the Apex Court in the case of *Manju Surana* has opined that the issue needs to be settled by a larger bench. The Supreme Court has not held that the law laid down in *Anil Kumar v. M K Aiyappa*as **per incurium or bad law** in the light of earlier judgements of three Judges in *RR Chari &Devarapalli.*

4.2 While confronted with the question as to which law has to be followed till the issue is settled by a larger bench of Supreme Court, the division bench of Kerala High Court in *Mohammed V.A. v. State of Kerala*, the Single Judge of Calcutta High Court in *Dr.Nazarul Islam v. Basudeb Banerjee &Ors* as well as the co-ordinate bench of this Hon'ble Court in *Anil Kumar B. H. v. Lokayuktha Police* have unequivocally held that the law as laid down by the Apex Court in the matters of *Anil Kumar v. M K Aiyappa*alone holds the field till it is set aside, modified or altered by the larger bench of the Apex Court.

4.3 In the light of the opinion to refer the matter to larger bench in *Manju Surana* case while declining to hold the law laid down in *Aiyappa*as per incurium and the categorical finding laid down by the High court of Karnataka in *Anil Kumar B. H. v. Lokayuktha Police*, one cannot be permitted to contend to take a contrary view from that of the view taken by the Apex Court in Aiyappa inasmuch as the contention would be against the established principles of judicial discipline and propriety and the principles of Judicial Precedents as laid down by the Supreme Court in *SiddaramaSatlingappaMhetre v. State of Maharsatra*reported in (2011) 1 SCC 694. What has not been held to be a bad law by the Apex Court itself while referring the issue to be settled before the larger bench, no other Court can be called upon to hold the judgment rendered by the Apex Court in *Anil Kumar v. M K Aiyappa*to be bad and take a contrary view in the matter.

CONCLUSION –

As the Apex Court in *Manju Surana* case has only referred the issue regarding want of sanction for reference under section 156(3) of Crpc for investigation for an authoritative pronouncement and has not held the same to be *per incurium*, till such time it is so decided by a larger bench of Apex Court, it would be wise & prudent to follow the dictum as enunciated in *MK Aiyappa*and to insist for sanction for prosecution of a public servant for any offences under Prevention of Corruption Act, before passing an order under section 156(3) of Crpcreferring the complaint for investigation.