IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1904 OF 2021

Anil Vasantrao Deshmukh
Aged 70 years, Occu. Agricultural &
Social Service, having his address at
Dyaneshwar Bungalow, Malabar Hill,
Mumbai – 400006. ...Petitioner

Versus

1. The State of Maharashtra
(through the Secretary, Home
Department, Madama Cama Road,
Mumbai – 400 032.
2. Central Bureau of Investigation
Through Anti Corruption – V Plot
No.5B, First Floor, CGO Complex, Lodhi
Road, New Delhi – 110 003.
3. Dr. Jayshree Patil,
Age – Adult, Occu : Advocate,
Residing at 1601, Crystal Tower, Parel,
T. T. Parel (East), Mumbai – 400 012.
...Respondents

Mr. Amit Desai, Senior Advocate, a/w Mr. Kamlesh Ghumre, Mr. Prashant Pawar, Mr. Gopal Shenoy, Mr. Bhadresh Raju, Mr. Abhijeet Sawant, Mr. Unmesh Breed, Mr. Anand Dagai, i/b Ms. Sonali Jadhav a/w Ms. Dipti Bhat, for the petitioner.

Mr. Rafiq Dada, Senior Counsel, a/w Mr. Darius Khambata, Senior Counsel, Mr. Deepak Thakre, PP, Mr. Akshay Shinde, Mr. Phiroz Mehta & Mr. Tushar Hathiramani, for the State/Respondent no.1.

Mr. Aman Lekhi, ASG, a/w Mr. Anil C. Singh, Addl. SG, Mr. Aditya Thakkar & Mr. D. P. Singh, for the CBI/ Respondent no.2.

Dr. Jayshree Patil, Respondent no.3 present-in-person.

CORAM: S. S. SHINDE &
N. J. JAMADAR, JJ
RESERVED ON: 12th JULY, 2021
PRONOUNCED ON: 22nd JULY, 2021
(Through Video Conferencing)

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the Counsels for the parties, heard finally.

2. The petitioner, who is the former Home Minister of the State of Maharashtra, has preferred this petition under Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973, (for short "the Code") for a writ, direction or order to quash and/or set aside First Information Report (for short "FIR") bearing RC No.2232021A0003, dated 21st April, 2021, registered by the Central Bureau of Investigation ("CBI") - respondent no.2, and all the consequent proceedings initiated pursuant to the said FIR. The aforesaid FIR came to be registered consequent to preliminary enquiry ordered by a Division Bench of this Court by order dated 5th April, 2021, in Writ Petition No.1541 of 2021, filed by Dr. Jayshree Patil – respondent no.3-in-person.

3. To begin with, it may be apposite to briefly note the circumstances in which the aforesaid order dated 5th April,

2021, directing a preliminary enquiry, came to be passed.

(a) The genesis is in an FIR bearing CR No.35 of 2021, registered with Gamdevi Police Station, in connection with the occurrence wherein a gelatin laden SUV was found near the residence of an industrialist. Eventually, the National Investigation Agency ("NIA") took over the investigation in the said crime. As the investigation allegedly revealed the complicity of Mr. Sachin Vaze, the then API attached to Crime Investigation Unit of Crime Branch, Mumbai, he was arrested. In the wake of the controversy, Mr. Param Bir Singh, the then Commissioner of Police was transferred as Commandent General, Home Guards, Maharashtra, by an order dated 17th March, 2021.

(b) The petitioner, who was then holding the office of Home Minister, alleges that, in retaliation to the transfer, Mr. Param Bir Singh addressed a letter, dated 20th March, 2021, to the Hon'ble Chief Minister, making wild, malafide and unjustified allegations. As the said letter came in the public domain, respondent no.3 lodged a complaint with Malbar Hill Police Station annexing thereto a copy of the letter addressed by Mr. Param Bir Singh.

4. Mr. Param Bir Singh filed a Writ Petition (Civil) No. 385

of 2021, before the Supreme Court seeking, *inter alia,* a direction to the Central Bureau of Investigation to conduct impartial, unbiased and fair investigation, in the various "corrupt malpractices" of the petitioner. It was withdrawn with liberty to approach the High Court. PIL Petition No.6 of 2021 (*Param Bir Singh s/o Hoshiyar Sing vs. The State of Maharashtra & ors.*) was filed by Mr. Param Bir Singh for the aforesaid relief. In addition, a direction was sought against the State of Maharashtra to ensure that transfer and posting of police officials are neither done on any consideration of pecuniary benefits to any politician nor in contravention of the direction of the High Court in ***Prakash Singh & ors vs. Union of India & ors.***[1] Dr. Jayahree Patil – respondent no.3 herein, preferred Writ Petition No.1541 of 2021, again seeking an unbiased, uninfluenced, impartial and fair investigation in various "corrupt malpractices" of the petitioner and others, who were named in her complaint. Mr. Ghanshyam Upadhyaya preferred a PIL, being Criminal Public Interest Litigation (ST) No.6072 of 2021, for thorough investigation. All these petitions, along with Criminal Public Interest Litigation (ST) No.6166 of 2021, filed by Mr. Mohan Prabhakar Bhide, seeking appointment of a Committee headed by a

---

1 (2006) 8 SCC 1.

retired Judge of the Supreme Court or this Court to investigate the allegations made by Mr. Parm Bir Singh, were heard and disposed of by the Division Bench (Coram: Hon'ble The Chief Justice and G. S. Kulkarni, J) by order dated 5th April, 2021.

5. This Court recorded that the allegations in the letter of Mr. Param Bir Singh, were serious in nature and against the highest functionary of the Government of Maharashtra, when it came to functioning of the police department. The issues raised were such that the very faith of citizens in the functioning of the police department was at stake. Such allegations, therefore, could not remain unattended and were required to be looked into in the manner known to law when, *prima facie,* they indicated commission of a cognizable offence. Thus, directions were required for facilitating an unbiased, impartial, fair but effective probe so that the truth is unearthed. Since the petitioner was the Home Minister there could have been no fair, impartial, unbiased and untainted probe, if the same were to be entrusted with the State Police Force. Therefore, the probe was required to be entrusted to an independent agency like CBI.

6. The Division Bench concluded that interest of justice

would be sufficiently served if the Director, CBI, was directed to initiate a preliminary enquiry into the complaint of Dr. Patil, which had the letter of Mr. Param Bir Singh addressed to the Hon'ble Chief Minister, as an annexture. The Director (CBI) was, thus, ordered to conduct the preliminary enquiry, preferably within 15 days. Post completion of inquiry, the Director (CBI) was also given liberty to decide on the future course of action, in accordance with law.

7. To complete the narration, it is necessary to note that the petitioner as well as the State of Maharashtra – respondent no.1, challenged the aforesaid order dated 5th April, 2021, by filing Special Leave Petition (Cri) Diary No.9414/2021(*Anil Deshmukh vs. The State of Maharashtra & ors.)* and Special Leave Petition (Cri) Diary No.2999-3002/2021, respectively. The special leave petitions were dismissed by the Supreme Court by order dated 8th April, 2021, observing that the nature of allegations, the personas involved and the seriousness of the allegations required an independent agency to enquire into the matter.

8. In adherence to the order of the Division Bench, respondent no.2 registered preliminary enquiry against the petitioner and unknown others vide PE2232021A0001, dated

6th April, 2021. After completion of preliminary enquiry, Mr. R. S. Gunjiyal, DSP, AC-V, CBI, New Delhi, lodged complaint against the petitioner and unknown others, purportedly on the basis of the findings of the preliminary enquiry. On the strength thereof, RC No.2232021/A0003 came to be registered on 21st April, 2021 alleging, *inter alia,* that the preliminary enquiry, *prima facie,* revealed that the cognizable offence is made out wherein the petitioner and unknown others attempted to obtain undue advantage for improper and dishonest performance of their duty. Thus FIR came to be registered for the offences punishable under Section 7 of the Prevention of Corruption Act, 1988 (for short "the PC Act") and Section 120-B of the Indian Penal Code, 1860, (for short "the IPC") against the petitioner and unknown others.

9. (a) Petitioner has invoked the writ jurisdiction of this Court with the assertions that the FIR has been registered in gross violation of the fundamental rights of the petitioner, and for extraneous considerations. The preliminary enquiry did not reveal any material which would justify the registration of the first information report. The FIR thus, *prima facie,* does not disclose any offence. Moreover, since

there is a legal bar to the registration of the FIR, incorporated in Section 6 of the Delhi Special Police Establishment Act, 1946, ("the DSPE Act") and Section 17A of the PC Act, the action of respondent no.2 in registering the FIR is not in accordance with law, the only course which the Division Bench had directed respondent no.2 to pursue post preliminary enquiry.

(b) The petitioner further asserts that respondent no.2 by registering the aforesaid FIR has endeavoured to enter into the matters which were expressly excluded by the order of the Division Bench from the very purview of the preliminary enquiry. Aspect of transfer and posting of police officials was specifically kept out of the ambit of the preliminary enquiry. The insistence of respondent no.2 to delve into the transfer and posting of police officials is again in teeth of the provisions contained in Section 6 of the DSPE Act as in the absence of the consent of the State Government respondent no.2 is not authorized to investigate into a matter which squarely falls within the province of the State.

(c) Even otherwise, according to the petitioner, the FIR, as it stands, does not make out the essential ingredients of Section 7 of the PC Act. Nor a *prima facie* case for the

offence punishable under Section 120B of the IPC is made out. Hence, the FIR and the consequent investigation, which is tainted with malice and ulterior motive, deserves to be quashed and set aside.

10. (a) An affidavit-in-reply is filed on behalf of respondent no.2 – CBI. In the backdrop of the Division Bench order directing the preliminary enquiry, the tenability of the petition is assailed. The instant petition is stated to be an instance of abuse of the process of the Court as the Division Bench has elaborately considered the necessity of investigation in the light of the grave nature of the allegations against the petitioner.

(b) Legal bar sought to be raised to the registration of the FIR, both under Section 6 of the DSPE Act and 17A of the PC Act, is stated to be misconceived. Since the investigation by CBI is ordered by the constitutional court, according to Respondent no.2, the interdict contained in Section 6 of the DSPE Act does not come into play. Nor the prior approval of the competent authority, as envisaged by the provisions contained in Section 17A of the PC Act, is warranted as the offence of attempt to obtain undue advantage for improper and dishonest performance of the public duty does not form

part of, "recommendation made or decision taken by the public servant in discharge of his official functions or duties". Moreover, where the investigation is ordered by the Constitutional Courts no question of prior approval for investigation arises. Respondent no.2 thus contends that the FIR has been registered in conformity with the order of this Court and the governing provisions.

(c) On merits, it is categorically denied that the FIR does not, *prima facie,* disclose commission of the offences. Both the offences punishable under Section 7 of the PC Act and 120B of the IPC are made out by the assertions in the FIR and the documents annexed thereto.

11. At this juncture, it may apposite to note the worst part of the allegations against the petitioner in the letter of Mr. Param Bir Singh. The following allegations bear upon the determination of the instant petition:

> "**6**. At one of the briefing sessions in the wake of the Antilia incident held in mid-March 2021 when I was called late evening at Varsha to brief you, I had pointed out several misdeeds and malpractices being indulged into by the Hon'ble Home Minister……."
>
> **7.** In the aforesaid context, Shri Sachin Vaze who was heading the crime intelligence unit of the crime branch of the Mumbai police was called by Shri Anil Deshmukh, Hon'ble Home Minister, Maharashtra to his official residence Dnyaneshwar several times in last few months and repeatedly instructed to assist in collection of funds for the Hon'ble Home Minister. In and around mid-February and

thereafter, the Hon'ble Home Minister had called Shri Vaze to his official residence. At that time, one or two staff members of the Hon'ble Home Minister including his personal secretary, Mr. Palande, were also present. The Hon'ble Home Minister expressed to Shri Vaze that he had a target to accumulate Rs.100 Crores a month for achieving the aforesaid target, the Hon'be Home Minister told Shri Vaze that there are about 1,750 bars, restaurants and other establishments in Mumbai and if a sum of Rs.2-3 lakhs each was collected from each of them, a monthly collection of Rs.40-50 crores was achievable. The Hon'ble Home Minister added that the rest of the collection could be made from other sources.

8. Shri Vaze came to my office the same day and informed me of the above. I was shocked with the above discussion and was mulling over how to deal with the situation.

9. .....While ACP Patil and DCP Bhujbal were made to wait outside the Hon'ble Home Minister's cabin, Mr. Palande, Personal Secretary to the Hon'ble Home Minister, went inside the chamber of the Hon'ble Home Minister and after coming out took ACP Patil and DCP Bhujbal on the side. Mr. Palande informed ACP Patil that the Hon'ble Home Minister was targeting a collection of Rs.40-50 Crores which was possible through an approximate 1,750 bars, restaurants and establishments operating in Mumbai. I was informed by ACP Patil about the demand to make collections for the Hon'ble Home Minister.

.....

11. After the meeting of Shri Vaze with the Hon'ble Home Minister, he had discussed the instructions of the Hon'ble Home Minister with Shri Patil and both of them had approached me with their predicaments.

12. The Hon'ble Home Minister has as a regular practice been repeatedly calling my officers and giving them instructions in respect of the course to be followed by them in performance of their official duties. The Hon'ble Home Minister has been calling my officers at his official residence bypassing me and other superior officers of the Police Department to whom those respective Police Officers report to. The Hon'ble Home Minister has been instructing them to carry out official assignments and collection schemes including financial transactions as per his instructions based on his expectations and target to collect money. These corrupt malpractices have been brought to my notice by my officers.

.....

17. It has been my experience during the last more than one year as Commissioner of Police, Mumbai that the Hon'ble Home Minister has on numerous occasions called several officers from the Mumbai Police to his official residence at

> Dnyaneshwar for giving instructions to adopt a specific course of action in police investigations……."
> …….
>
> **20.** ……The call records and phone data of Shri Sachin Vaze be examined to ascertain the truth of the allegations qua me and for the truth to emerge insofar as his association with political functionaries is concerned."

12. How the Division Bench viewed the aforesaid allegations and proceeded to deal with the method of inquiring into the same, in a manner known to law, becomes evident from the observations of the Division Bench in paragraphs 75, 80, 82 and 83 of the order dated 5th April, 2021. They deserve extraction in extenso:

> "**75**. We have perused the complaint of Dr. Patil to consider as to whether it makes out a prima facie case of a cognizable offence. Examination of the veracity and/or credibility of the allegations contained therein is not our task, at this stage. Dr. Patil annexed to her complaint a copy of Shri Param Bir's letter to the Hon'ble Chief Minister. Relevant portions thereof have been extracted supra. The information furnished therein discloses commission of cognizable offences by Shri Deshmukh and in our prima facie view, should have been acted upon in the manner required by the CrPC, and as judicially interpreted by the Supreme Court in Lalita Kumari (supra). Whether or not an FIR ought to be straightaway registered on the basis thereof or a preliminary inquiry ought to precede registration of an FIR, is a matter which we propose to consider after applying our mind as to whether the present case deserves to be referred to the CBI.
> ……
>
> **80.** In the present case, it is clear that Dr. Patil had submitted her complaint to the Senior Police Inspector of the Malabar Hill Police Station on March 21, 2021; however, except for making an entry in the Inward Register, no action whatsoever, as the law would mandate, was initiated. We have already noted above that the allegations as made by Shri Param Bir in the letter dated March 20, 2021, which triggered Dr. Patil to lodge complaint with the Malabar Hill Police Station, Mumbai, is of a serious nature and against

the highest functionary of the Government of Maharashtra, when it comes to the functioning of the police department. Prima facie, the issues are such that the very faith of citizens in the functioning of the police department is at stake. If there is any amount of truth in such allegations, certainly it has a direct effect on the citizens' confidence in the police machinery in the State. Such allegations,therefore, cannot remain unattended and are required to be looked into in the manner known to law when, prima facie, they indicate commission of a cognizable offence. It is, hence, certainly an issue of credibility of the State machinery, which would stare at the face when confronted with the expectations of the law and when such complaints are received against high ranking public officials. This Court cannot be a mere spectator in these circumstances. There is certainly a legitimate public expectation of a free, fair, honest and impartial inquiry and investigation into such allegations which have surfaced in the public domain. The necessity to have a probe into such allegations by an independent agency, would also certainly be a requirement of the rule of law. To instill public confidence and safeguard the Fundamental Rights of the citizens, it is necessary that an inquiry and investigation is conducted by an independent agency and for such reasons, we consider it to be in the paramount public interest that an independent probe in the present circumstances would meet the ends of justice.

82. We quite agree with Shri Nankani and Shri Jha that an unprecedented case has before the Court. We alsoagree with Dr. Patil that directions are required for facilitting an unbiased, impartial, fair but effective probe so that the truth is unearthed and the devil, if any, shamed in accordance with procedure established by law. Here, Shri Deshmukh is the Home Minister. The police department is under his control and direction. There can be no fair, impartial, unbiased and untainted probe, if the same were entrusted to the State Police Force. As of necessity, the probe has to be entrusted to an independent agency like the CBI. While so entrusting, the note of caution in **P. Sirajuddin [(1970) 1 SCC 595]** has to be borne in mind. Although we do not see an immediate reason to direct registration of an FIR by the CBI based on Dr. Patil's complaint, interest of justice, in our opinion, would be sufficiently served if the Director, CBI is directed to initiate a preliminary inquiry into the complaint of Dr. Patil which has the letter of Shri Param Bir addressed to the Hon'ble Chief Minister, as an annexure. This would be in perfect accord with paragraph 120.6 of **Lalita Kumari [2014(2) SCC 1].** Also, the press release of Shri Deshmukh suggests that he is not averse to facing any inquiry. It is, therefore, ordered accordingly.

> **83.** Such preliminary inquiry shall be conducted in accordance with law and concluded as early as possible but preferably within 15 (fifteen) days from receipt of a coy of this order. We hope and trust that the officer(s) appointed for the purpose of conducting preliminary inquiry shall receive due cooperation from individuals/agencies who are approached therefor. Once the preliminary inquiry is complete, the Director, CBI shall be at liberty to decide on the future course of action, also in accordance with law. Should the Director, CBI see no reason to proceed further, Dr. Patil shall be duly informed of the same."

13. Preliminary enquiry, as directed by the Division Bench, according to respondent no.2 – CBI culminated in the registration of the RC. Since the questions which crop up for consideration turn upon the averments in the FIR as well, for appreciation in the correct perspective, we deem it appropriate to extract the relevant portion of the FIR:

> "The Preliminary Enquiry prima facie revealed that a cognizable offence is made out in the matter, wherein the then Home Minister of Maharshtra, Shri Anil Deshmukh and unknown others have attempted to obtain undue advantage for improper and dishonest performance of their public duty.
>
> Enquiry has also revealed that Shri Sachin Vazze, Assistant Police Inspector, Mumbai Police had been reinstated into the police force after being out of the police service for more thatn 15 years. The enquiry further reveled that Shri Sachin Vaze was entrusted with most of the sensational and important cases of Mumbai City Police and that the then Home Minister was in knowledge of the said fact.
>
> Further, the petition of Shri Param Bir Singh (Annexure -C, 104 pages) also finds attention of the fact that the then Home Minister of Maharashtra and others exercised undue influence over the transfer & posting of officials and thereby exercising undue influence over the performance of official duties by the officials."

14. In the light of the aforesaid background facts and pleadings, we have heard Mr. Amit Desai, the learned Senior Counsel for the petitioner and Mr. Lekhi, the learned Addl. Solicitor General, for respondent no.2 – CBI, at length. With the assistance of the learned Counsels, we have also perused the material on record. A report regarding the status of investigation was also tendered for our perusal in a sealed envelope.

15. Mr. Desai, the learned Senior Counsel for the petitioner, took a slew of exceptions to the registration of the aforesaid FIR and consequent investigation. It was strenuously urged that the instant prosecution is a classic example of enmity, animosity and politics joining hands to play the game of perception and thereby jeopardise the life, liberty and reputation of the petitioner. In such a situation, protection by a constitutional Court is imperative lest the rule of law, which is the bedrock of constitutional democracy, would become a casualty. In the case at hand, according to Mr. Desai, the registration of the FIR is in flagrant violation of the principles of constitutionality, federal polity and the constitutional and statutory rights of the petitioner.

16. Amplifying the aforesaid submissions, Mr. Desai, laid

emphasis on the fact that the Division Bench had directed only a preliminary enquiry and that too in accordance with the law. Post completion of preliminary enquiry, respondent no.2 was duty bound to seek the consent of the State Government as envisaged by Section 6 of the DSPE Act. Since the Division Bench did not direct the registration of the FIR, it was not open to CBI to straightway register the FIR and enter upon investigation in teeth of the provisions contained in Section 6 of the DSPE Act, urged Mr. Desai. The endeavour of respondent no.2 to enter into investigation without the consent of the State Government, according to Mr. Desai, is in gross violation of the principle of federalism, which is the basic structure of the Constitution. To lend support to this submission, Mr. Desai placed a very strong reliance on the judgment of the Supreme Court in the case of ***State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal, and others[2] ("CPDR").***

17. As a second limb of the submission based on the bar under Section 6 of the DSPE Act, Mr. Desai would urge that respondent no.2 – CBI, in any event, was auhorised to conduct enquiry only into the allegations in the complaint of Dr. Patil, to which the letter of Mr. Param Bir Singh was

2 (2010) 3 SCC 571.

annexed. Respondent no.2 could not have transgressed beyond the ambit of the order of the Division Bench. The matter of reinstatement of Mr. Sachin Vaze, the alleged entrustment of sensational and important cases to Mr. Vaze as well as alleged exercise of undue influence over transfer and posting of officials, referred to in the FIR, (extracted above) were clearly beyond the scope of the enquiry ordered by the Division Bench. Such endeavour of respondent no.2 to usurp the jurisdiction to investigate stands foul of the interdict contained in Section 6 of the DSPE Act. Support was sought to be drawn from the judgment of the Supreme Court in the case of ***Ms. Mayawati vs. Union of India and others.***[3]

18. Mr. Desai further urged, with a degree of vehemence, that there can be no qualm over the proposition that a crime should not go uninvestigated. However, it was equally imperative that the investigation must be in accordance with the procedure established by law. In the instant case, the action of respondent no.2 in embarking upon investigation against the petitioner, with the allegations that the petitioner attempted to obtain undue advantage for improper and dishonest performance of his public duty, is in complete

3 (2012) 8 SCC 106.

negation of the constitutional guarantee of right to life and personal liberty under Article 21 of the Constitution of India. In view of the provisions contained in Section 17A of the PC Act, introduced by the Amendment Act, 2018, the professed investigation into the offences alleged to have been committed by the petitioner in discharge of public duty, without the approval of the competent authority, is in clear violation of the procedure established by law. In the absence of such approval, the continuation of the further proceedings constitutes an abuse of the process of the Court and deserves to be quashed, urged Mr. Desai.

19. Apart from the aforesaid challenges based on statutory bar for investigation, it was canvassed on behalf of the petitioner that the FIR is based on legally inadmissible material. The letter of Mr. Param Bir Singh, which constitutes the fulcrum of the prosecution, being a product of hearsay, hardly furnishes a sustainable ground for registration of the FIR. Even otherwise, the allegations made in the FIR taken at their face value and accepted in their entirety, do not make out a *prima facie* offence. It is bereft of facts. No attempt is evident. Nor the element of conspiracy is discernible, even remotely. Mr. Desai thus urged that mere

reiteration of the ingredients which constitute an offence punishable under Section 7 of the PC Act in the FIR is of no legal consequence. By applying the settled principles which govern the exercise of jurisdiction to quash the FIR/prosecution, the FIR in the instant case is required to be quashed, submitted Mr. Desai.

20. In opposition to this Mr. Lekhi, the learned ASG for respondent no.2 – CBI stoutly submitted that the instant petition is an undisguised attempt to revisit the order passed by the Division Bench on 5th April, 2021. Mr. Lekhi would urge that the principles, which the order of the Division Bench upholds, and the spirit thereof cannot be lost sight of. The avowed object of the order of the Division Bench was to instill public confidence in the State machinery as such, as the allegations were of such a nature that the governance was shown to be an exercise in organized crime. The action of respondent no.2 in conducting the preliminary enquiry and registering the FIR is in due compliance of the order passed by the Division Bench and, thus, the instant petition does not deserve to be entertained.

21. Taking the court through the observations of the Division Bench in the order dated 5th April, 2021, Mr. Lekhi

submitted that the Division Bench has recorded at more than one places that the allegations against the petitioner, *prima facie,* made out a cognizable offence. In the face of such observations, the endeavour on the part of the petitioner to urge that no offence is, *prima facie,* made out is unworthy of countenance.

22. Mr. Lekhi would further urge that the submission on behalf of the petitioner that the interdict contained in Section 6 of the DSPE Act comes into play is wholly misconceived. By making reference to the observations of the Constitution Bench in the case of ***CPDR*** (supra), Mr. Lekhi strenuously urged that a direction for registration of FIR and consequent investigation is implicit in the order of the Division Bench dated 5th April, 2021. Once the constitutional Court is persuaded to exercise the extraordinary jurisdiction to authorise CBI to inquire into a matter, sans the consent of the State under Section 6 of the DSPE Act, the objection to further action, in conformity with the directions of the Court, is thoroughly unsustainable. The submission is in utter ignorance of the wide amplitude of the power of the High Court under Article 226 of the Constitution of India, urged Mr. Lekhi.

23. The challenge to the registration of FIR, based on the provisions contained in Section 17A of the PC Act is equally misconceived, submitted Mr. Lekhi. Adverting to the object of Section 17A of the PC Act, namely, to insulate the public servants from frivolous inquiry and investigation, Mr. Lekhi canvassed a submission that where the constitutional Court, after recording a *prima facie* satisfaction that enquiry / investigation is warranted, orders such inquiry or investigation, the bar under Section 17A does not at all come into play as the protection, which the approval by the competent authority affords, is substituted by a more efficacious and judicious scrutiny by constitutional Court. Where a constitutional Court is called upon to exercise the extraordinary powers in a situation where there is crisis of credibility of the State apparatus, the statutory provisions, be it Section 6 of DSPE Act or Section 17A of the PC Act, do not impinge upon the Court's power, submitted Mr. Lekhi. It was further urged that in the facts of the instant case, in the face of the manifest disinclination on the part of the State of Maharashtra to even look into the allegations, as noted by the Division Bench, it would be absurd to urge that the CBI ought to have sought approval of the State Government.

24. Mr. Lekhi would urge that the submission on behalf of the petitioner that the allegations in the FIR are bereft of facts and do not make out an offence is unworthy of acceptance. The FIR in question explicitly refers to the complaint of Dr. Patitl as well as the letter of Mr. Param Bir Singh, as annexures thereto. Since the Division Bench in its order dated 5th April, 2021 has recorded in clear and explicit terms that the letter of Mr. Param Bir Singh, *prima facie,* discloses cognizable offences, it is now not open for the petitioner to agitate the said issue, especially when the order of the Division Bench was affirmed by the Supreme Court in the Special Leave Petition preferred by the petitioner.

25. We have given careful consideration to the aforesaid rival submissions. In the context of the controversy and the submissions canvassed across the bar, the following questions fall for consideration:

(i) Is the registration of FIR and consequent investigation barred by the provisions of Section 6 of the DSPE Act?

(ii) Is the investigation barred by the provisions of Section 17A of the PC Act?

(iii) Whether the registration of the FIR and consequent

investigation are in conformity with the order of the Division Bench?

(iv) Whether the FIR and consequent proceedings are liable to be quashed in exercise of extraordinary and inherent jurisdiction?

26. Question No.(i): Bar under Section 6 of the DSPE Act:

The thrust of the submission on behalf of the petitioner was that the Division Bench consciously and cautiously chose to order a preliminary enquiry and not registration of the FIR. The Division Bench was further circumspect in expressly directing that after the completion of the enquiry, the Director, CBI, shall be at liberty to decide on the future course of action, also in accordance with law. Mr. Desai would urge that the mandate of the order dated 5th April, 2021, stops at that. After completion of the preliminary enquiry, before the respondent no.2 proceeded to register the FIR and enter into investigation, it was enjoined to seek the consent of the State Government under Section 6 of the DSPE Act. Any deviation therefrom would infringe the federal structure of the Constitution, urged Mr. Desai.

27. Elaborating the aforesaid submission, Mr. Desai, urged

that there is a well recognized distinction between an enquiry and investigation, especially where the CBI exercised the power and jurisdiction under DSPE Act. (***Shashikant vs. Central Bureau of Investigation***[4]) Such distinction cannot be obliterated to the prejudice of the State concerned. What exacerbates the situation, according to Mr. Desai, is the fact that respondent no.2 is fully conscious of its limitations in registration of the FIR, despite the order of the constitutional court to conduct a preliminary enquiry, and has chosen to follow the said course in somewhat similar circumstances before the Gauhati High Court in the case of ***Taba Tedir and another vs. Central Bureau of Investigation***[5]

28. In the case of ***CPDR*** (supra) the Constitution Bench concurred with the observations of the Supreme Court in the case of ***Minor Irrigation and Rural Engineering Services vs. Sahngoo Ram Arya***[6] to the effect that an order directing the enquiry by CBI should be passed only when the High Court, after considering the material on record, comes to the conclusion that such material discloses a *prima facie* case calling for an investigation by CBI or any other similar

---

4 (2007) 1 SCC 630.

5 2019 SCC Online Gaui 3451.

6 (2002) 5 SCC 521.

agency. In the case at hand, the Division Bench referred to the aforesaid position in law and recorded that the allegations against the petitioner *prima facie* disclose cognizable offence. Ultimate direction for institution of a preliminary enquiry is required to be viewed through the aforesaid prism of *prima facie* satisfaction recorded by the Division Bench about its necessity.

29. In our understanding, what weighed with the Division Bench in ordering a preliminary enquiry instead of a direction for registration of FIR was the caution administered by the Supreme Court in the case of ***P. Sirajuddin vs. State of Madras***[7] that before a public servant whatever be his status, is publicly charged with acts of dishonesty which amounts to serious misdemeanour or misconduct and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The Division Bench also found the said course to be in perfect accord with paragraph 120.6 of the Constitution Bench judgment in the case of ***Lalita Kumari vs. Government of UP.***[8]

30. In the backdrop of the nature of the allegations and the

---

7 1971 SCC 595.

8 2014(2) SCC 1.

observations of the Division Bench, we find it rather difficult to accede to the submission on behalf of the petitioner that the direction for the institution of the preliminary enquiry was for the reason that the Division Bench did not find the allegations worthy of directing registration of the FIR. The ultimate direction for preliminary enquiry cannot thus be construed in isolation and torn of the observations which precede the said direction.

31. The submission on behalf of the petitioner that even when a constitutional court orders a preliminary enquiry by CBI into a matter which falls within the province of the State, without the consent of the State, at a later stage the interdict contained in Section 6 of the DSPE Act again operates with full force, in our view, losses sight of the amplitude of the power of the Constitutional Court, which is exercised in exceptional and extraordinary circumstances.

32. Section 5 of the DSPE Act enables the Central Government to extend the powers and jurisdiction of the members of the Delhi Police Establishment for investigation into offences or class of offences specified in a notification under Section 3, to any area in a State. The said power is however controlled by Section 6. It precludes a member of

the Special Police Establishment to exercise powers and jurisdiction in any area in a State, without the consent of the Government of that State.

33. In the aforesaid context, the question which arose for consideration in the ***CPDR*** (supra) was whether the High Court can direct CBI, an agency established by the Union to do something in respect of the State subject, without the consent of the State Government concerned. The Constitution Bench, after considering the challenge principally based on the federal structure and doctrine of separation of powers, held that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed, within the territory of a State without the consent of that State will neither impinge upon the federal structure of the constitution nor violate the doctrine of separation of power and shall be valid in law. While arriving at the aforesaid conclusion, the Supreme Court culled out the principles in paragraph 68. The following principles bear upon the controversy at hand:

> "**68.** (i)....
>
> (ii) ....

(iii) ....

(iv) ....

(v) Restriction on Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Article 32 and 226 of the Constitution.

(vi) If in terms of Entry 2 of List II of The Seventh Schedule on the one hand and Entry 2-A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, Court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the Statute. In our opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty.

(vii) When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the Constitutional Courts. Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure."

(emphasis supplied)

34. The Supreme Court has, in terms, observed that the constitutional court, in a deserving case, is not precluded from exercising the same power (to direct the CBI to investigate) which the Union could exercise in terms of the provisions of the statute. When CBI can take up investigation,

albeit with the consent of the State, in relation to the crime which was otherwise within the jurisdiction of the State Police, the Court can also, in exercise of its power of judicial review, direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the DSPE Act.

35. The aforesaid exposition of law, in emphatic terms, rules out the application of Section 6 of the DSPE Act at a subsequent stage where the High Court, upon being satisfied about its justifiability, directs an enquiry by CBI. In such a situation, the authority to exercise the powers and jurisdiction over a matter which would otherwise fall within the province of the State police, stems from the order of the High Court. In our view, the true import of such order is to invest the CBI with the power and jurisdiction which it did not statutorily possess. Such an order cannot be so constricted as to rob it of meaning and content, unless the order itself limits the contours of the authority. To urge that the authority gets exhausted the moment the preliminary enquiry is completed is in negation of the very power of the constitutional court to order such inquiry in exercise of

judicial review. Once a constitutional court passes an order authorizing CBI to inquire into a matter, the latter is invested with the requisite power and jurisdiction to pursue the proceeding to a logical culmination. If the State Government were to interdict the investigation, at an intermediate stage, by withholding or denying the consent, the order of the constitutional court directing enquiry would be denuded of mandate and efficacy.

36. Reliance on the order of the Guahati High Court in the case of ***Taba Tedir*** (supra) is of no assistance to the petitioner. In the said case, a Division Bench of Guahati High Court had directed the CBI to have preliminary enquiry into the allegations that contracts were allotted to the kith and kin of respondent no.7 therein, a Minister in the State of Arunachal Pradesh. It was further directed that in case the allegations were found to have substance warranting further proceedings with criminal prosecution, the CBI may proceed in accordance with law. Preliminary enquiry was conducted. An application was preferred by CBI seeking a direction from the Court to the competent authority to grant approval under Section 17A of the PC Act. Subsequently, the application came to be withdrawn. The petitioner therein, against whom

FIR was registered assailed the prosecution, *inter alia,* on the ground that the it was incumbent upon CBI to obtain approval under Section 17A of the PC Act before registering the FIR. When the matter came up before the Court, a statement was made on behalf of the CBI that CBI was open to obtain necessary approval from the competent authority. In the backdrop of the said statement the Court did not find it necessary to enter into the merits of the contentious issue, and the petition came to be disposed of by granting leave to CBI to take steps for obtaining approval under Section 17A.

37. Evidently, the Court had not delved into the merits of the matter. Nor the issue of requirement of consent of the State under Section 6 of the DSPE Act and approval of the competent authority under Section 17A of the PC Act was examined. In fact, a submission was also made on behalf of the respondent therein that in view of the direction of the High Court to hold preliminary enquiry, approval was not required. In this setting of the matter, the disposal of the writ petition on the basis of a statement that CBI was open to obtain the approval can hardly lay down a legal proposition. Nor would it advance the cause of the submission on behalf of the petitioner that respondent no.2 – CBI was conscious of

the peremptory nature of the said requirement.

38. In our view, the proposition sought to be canvassed on behalf of the petitioner that the mandate of the order for enquiry by CBI, passed by the High Court, would stand exhausted the moment preliminary enquiry is completed, is impregnated with an insurmountable incongruity. If the submission is taken to its logical end, it would imply that the situation would be brought to *status quo ante* the date of the passing of the order by the High Court for enquiry. Conceivably, a State Government can frustrate the purpose of independent investigation by CBI by withholding or denying the consent. Such an anomalous situation cannot be countenanced especially when the Division Bench has adverted to the necessity of entrusting the enquiry to an independent agency as it found that cognizable offences were *prima facie* made out. We are, thus, not inclined to accede to the submission of Mr. Desai, that the investigation by CBI is barred by the provisions contained in Section 6 of the DSPE Act.

39. **Question No.(ii): Bar under Section 17A of the Prevention of Corruption Act:**

A more vigorous attack against the continuation of the

investigation was mounted on the premise that the investigation is wholly without jurisdiction in view of the bar created by Section 17A of the PC Act, inserted by the Amendment Act 16 of 2018. Mr. Desai submitted that the history of prevention of corruption laws would indicate that there has been a constant tension between the two objectives: eradication of corruption and protection of innocent public servants. Corrupt must be punished. At the same time, the procedure established by law to protect the innocent public servants from motivated, vexatious and frivolous proceedings, also serves a definite public interest. The anxiety to protect the public servants manifested in repeated attempts to introduce a mechanism which envisages such protection, despite such measures having been struck down, underscores the legislative intent as well as the necessity to protect the public servants. Alluding to single directive No.4.7(3), which warranted prior sanction before enquiry was initiated by CBI against a decision making level officer, which was struck down in ***Vineet Narain and others vs. Union of India and another,***[9] Section 6A of the DSPE Act, which came to be enacted after the decision of the Supreme Court in the case of ***Vineet Narain*** (supra) and was, in turn, struck down

---

9 (1998) 1 SCC 226.

by the Supreme Court in the case of ***Subramanian Swamy vs. Director, Central Bureau of Investigation and another***[10] as being violative of Article 14 of the Constitution of India, Mr. Desai urged that with a view to provide the protection to all the public servants, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of their official functions or duties, the Parliament has now barred enquiry or investigation without the approval of the competent authority, by inserting Section 17A in the PC Act. This protection is a part of the procedure established by law, under Article 21 of the Constitution. It was urged that in the instant case, since the investigation is commenced sans the approval of the competent authority, the entire exercise is vitiated. Therefore, this Court is called upon to exercise the extraordinary jurisdiction of balancing the rights, submitted Mr. Desai.

40. Section 17A of the Prevention of Corruption Act, reads as under:

> "**17-A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties:**(1) No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions

10 (2014) 8 SCC 682.

or duties, without the previous approval—

(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;

(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month."

41. On a plain reading, Section 17A precludes a police officer from conducting any enquiry, inquiry or investigation into any offence allegedly committed by a public servant where the offence is relatable to any recommendation made or decision taken by the public servant in discharge of his official functions or duties, without the previous approval of the specified competent authority. What is proscribed without approval is both enquiry and investigation. Evidently, the bar under Section 17A operates where the offence is alleged to have been committed in discharge of official functions or duties. Once the act complained of is shown to have nexus with the recommendation made or

decision taken by a public servant in discharge of such functions or duties, the interdict operates.

42. Mr. Desai strenuously submitted that the substratum of the FIR is that the petitioner attempted to obtain undue advantage for improper and dishonest performance of public duty. The petitioner is alleged to have exercised undue influence over the transfer and posting of officers and thereby further exercised undue influence over the performance of the official duty by the officials. Thus acts attributed to the petitioner squarely fall within the protective umbrella of Section 17A of the PC Act. All the acts have the direct nexus to the recommendations made or decisions taken by the petitioner. An inference is, according to Mr. Desai, inescapable that the alleged acts were in discharge of the official functions or duties. The necessary corollary is that the interdict contained in Section 17A operates with full force and vigour and renders the registration of the FIR and the consequent investigation legally unsustainable.

43. Mr. Desai would further urge that in the backdrop of the legislative history of providing a protective mechanism to the public servants, the provisions of Section 17A should receive a meaningful construct. Such a provision, as is

judicially recognized, cannot be construed too narrowly so as to render the protection illusory. The statutory safeguard must be strictly complied with as it is conceived in public interest. If the offence alleged to have been committed by a public servant has something to do or related in some manner with the discharge of a official duty, the protection must be extended.

44. To lend support to aforesaid submissions, our attention was invited to a large number of authorities, including the pronouncements of the Supreme Court in the cases of ***Shreekantiah Ramayya Munipalli vs. State of Bombay,***[11] ***State of Madhya Pradesh vs. Mubarak Ali***[12]***, B. Saha vs. M. S. Kochar,***[13] and ***Abdul Wahab Ansari vs. State of Bihar.***[14]

45. The legal position is fairly crystallized. To fall within the protective umbrella, the act constituting the offence ought to have been committed in the performance of the official duty or purported performance thereof. There must be a reasonable connection between the act and the discharge of the official duty. It is the quality of the act rather than the nature of the duty which is determinative.

---

11 (1955) 1 SCR 1177.
12 AIR 1959 SC 707.
13 (1979) 4 SCC 177.
14 (2008) SCC 500.

46. It would be advantageous to make a profitable reference to the judgment of the Constitution Bench in the case of ***Matajog Dobey vs. H. C. Bhari,***[15] wherein the legal position was illuminatingly postulated as under: "In the matter of grant of sanction under Section 197 of the Code of Criminal Procedure, the offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. There must be a reasonable connection between the act and the discharge of the official duty; the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duties".

47. Mr. Lekhi, the learned ASG, on the contrary, urged that in the facts of the case, the claim of the petitioner that the alleged offences were committed in discharge of official functions and duties is neither well grounded in facts nor in law. The offences alleged against the petitioner can not conceivably be described as having been committed in the performance or purported performance of official functions and duties. The authority which the petitioner drew from the position he held, only authorised the performance of what

15 AIR 1956 SC 44..

may be reasonably necessary for execution of the public duty. At best, the petitioner is laying a pretended and fanciful claim of performance of public duty as the official status only furnished the opportunity for the commission of the offences, urged Mr. Lekhi. Reliance was placed on the judgment of the Supreme Court in the case of ***Prakashsingh Badal vs. State of Punjab,***[16] wherein it was held that the offence of cheating and cognet offences can by no stretch of imagination by their very nature be regarded as having been committed by any public servant while acting or purporting to act in discharge of official duty. In such a case, official status only provides an opportunity for commission of the offence.

48. On the aforesaid touchstone, reverting to the facts of the case, the allegations against the petitioner can be classified in three broad categories. First, the petitioner, attempted to obtain undue advantage of his official position by directing the police officials to collect funds from certain sources. Second, the petitioner allegedly interfered with the course of investigation into certain cases and influenced the investigation. Third, the petitioner allegedly exercised undue influence over the transfer and posting of police officials with a view to further exercise undue influence over the

16 (2007) 1 SCC 1.

performance of public duties by those police officials.

49. By their very nature, the first two sets of acts, attributed to the petitioner, can by no stretch of imagination be said to be in the performance or purported performance of the official duties. It was no part of the duty of the petitioner to direct the collection of the funds, as alleged. Nor the petitioner had any authority in law to interfere with the course of investigation and give directions as to the manner in which the investigation is to be conducted by the police officers. It is trite that even the Courts can not tread that path. Mere statement in the FIR that the petitioner attempted to obtain undue advantage for improper and dishonest performance of his public duty, in the context of the aforesaid allegations, does not establish the nexus between the alleged acts and the discharge of official duty.

50. The submission on behalf the petitioner as regards third set of allegations, of exercising undue influence in the matter of transfer and posting of police officials, however, appears to carry some substance. In pursuance of the judgment of the Supreme Court in the case of ***Prakash Singh & ors. vs. Union of India & ors.***[17] under Chapter IIA of the

---

17 (2006) 8 SCC 1.

Maharashtra Police Act, 1951, Police Establishment Boards have been constituted, *inter alia,* to make recommendations to the State Government regarding the transfer and posting of police officers and also decide transfer and posting of police officers, based on their rank. Under Section 22N, the competent authority for general transfer and the mid-term transfer of the Maharashtra police service officers of and above the rank of Deputy Superintendent of Police is Home Minister, the position which the petitioner occupied.

51. An official act can be performed in the discharge of the official duty as well as in dereliction thereof. In the case at hand, the act complained of, exercise of undue influence over the transfer and posting of police officials, could have been given effect to by the petitioner only in the performance of the official duty. Dishonest performance thereof falls in the dragnet of the offences punishable under the PC Act and Penal Code. However, the reasonable nexus between the act complained of and the discharge of official duty can hardly be disputed.

52. Mr. Desai would urge that in a series of judgments rendered post insertion of Section 17A of the PC Act, the Supreme Court and various High Courts have held that the

provisions of Section 17A are mandatory in nature. Investigations commenced, without the approval of the competent authority, and the consequent prosecutions also have been quashed and set aside. Attention of the court was invited to the decisions of the Karnataka High Court in the case of ***Hemant Nimbalkar vs. State of Karnataka and others,***[18] the Gujarat High Court in the case of ***Bhayabhai Gigabhai Sutreja vs. State of Gujarat,***[19] the Kerala High Court in the case of ***Ramesh Chennithala vs. State of Kerala***[20] and the Rajasthan High Court in the case of ***Kailash Chandra Agarwal and another vs. State of Rajasthan and another.***[21]

53. A very strong reliance was placed on the judgment of the Supreme Court in the case of ***Yashwant Sinha and others vs. Central Bureau of Investigation and another***[22] wherein in a separate and concurrent opinion, Hon'ble Justice K. M. Joseph adverted to the import of the provisions contained in Section 17A of the PC Act.

54. As regards the various pronouncements of the High Courts adverted to above, which emphasize the mandatory

---

18 MANU/KA/0842-2021.
19 2020 SCC Online Guj 2266.
20 2018 SCC Online Ker 14261.
21 S.B. Criminal Misc.(Pet.) No.159/20218.
22 (2020) 2 SCC 338.

nature of the prior approval envisaged by Section 17A of the PC Act, there can be no qualm over the propositions enunciated therein as the phraseology of Section 17A is explicitly clear and unambiguous. In our view, the moot question that wrenches to the fore, in the instant case, is whether Section 17A of the PC Act operates as a fetter on the power of the High Court to direct inquiry and/or investigation in exercise of extraordinary jurisdiction under Article 226 of the Constitution? In our endeavour to find an answer to this question, we will advert to the pronouncement of the Supreme Court in the case of ***Yashwant Sinha*** (supra).

55. Under general criminal law, the police have a statutory duty to register an FIR, if a cognizable offence is made out, and a statutory right to investigate, if there is reason to suspect commission of a cognizable offence. The PC Act provides a special procedure for enquiry, investigation and trial of offences punishable thereunder, within the meaning of Section 4(2) and 5 of the Code of Criminal Procedure ("the Code"). Section 17A of the PC Act is a significant departure from the general law in as much as it mandates prior approval for inquiry or investigation. Does this statutory restriction on the power of the police operate as

an injunction against the constitutional court directing inquiry or investigation?

56. The pronouncement of the Constitution Bench in the case of ***CPDR*** (supra) illuminates the path. We have extracted the observations which bear upon the controversy at hand. The enunciation of law that restriction on the executive by the Parliament under an enactment, does not amount to restriction on the power of the judiciary under Article 32 and 226 of the Constitution makes the position abundantly clear. In the context of the interdict contained in Section 6 of the DSPE Act, the Constitution Bench ruled in unequivocal terms that, "Irrespective of there being any statutory provision acting as a restriction on the powers of the Court, the restrictions imposed by Section 6 of DSPE Act on the powers of the Union cannot be read as restrictions on the powers of the constitutional court."

57. It is a different matter that the constitutional Court may not ordinarily pass orders in derogation of the statutory provisions. However, where in an exceptional and extraordinary situation, the High Court exercises the plenary power of the judicial review under Article 226 and orders inquiry/investigation, the statutory provisions must yield to

the jurisdiction under Article 226, which is exercised to uphold the Constitution and maintain the rule of law.

58. As indicted above, the measure to insulate the public servants from motivated and frivolous inquiry and investigation has been on the legal horizon in the form of either executive instructions or legislative prescription. The latter was manifested in the form of Section 6A of the DSPE Act, which introduced the mechanism of prior approval of the Central Government for an inquiry or investigation in respect of the employees of the Central Government of the level of Joint Secretary and above and equivalent. In a sense, Section 6A of the DSPE Act is a precursor to the protection envisaged by Section 17A of the PC Act:

> "Section 6A of the DSPE Act reads as under:
>
> (1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of PC Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to—
>
> (a) the employees of the Central Government of the Level of Joint Secretary and above; and
>
> (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.
>
> (2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or

> attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to section 7 of the Prevention of PC Act, 1988 (49 of 1988).]"

59. In the case of ***Manohar Lal Sharma vs. Principal Secretary and others,***[23] a Three Judge Bench of the Supreme Court was confronted with the question, whether the approval of the Central Government is necessary under Section 6A of the DSPE Act in a matter where the inquiry/investigation into the crime under the Prevention of PC Act is being monitored by the Court.

60. In two separate opinions, the question was answered in the negative. The observations of the Supreme Court in paragraphs 49 and 50 note the submissions premised on the protection of the right of the public servant and the reasons for repelling the same. They read as under:

> "**49**. The argument of the learned Attorney General that Section 6-A is in the nature of procedure established by law for the purpose of Article 21 and where consequences follow in criminal law for an accused, the Court is not at liberty to negate the same even in exercise of powers under Article 32 of Article 142 overlook the vital aspect that Court monitoring of the inquiry/ investigation conducted by CBI is itself a very strong check on CBI from misusing or abusing its power of inquiry/ investigation. The filtration mechanism which Section 6-A provides to ensure that the senior officers at the decision making level are not subjected to frivolous inquiry is achieved as the constitutional court that monitors the inquiry/ investigation by CBI acts as guardian and protector of the rights of the individual and, if necessary, can always prevent any improper act by CBI against senior officers in the Central Government when brought before it.

---

23 (2014) 2 SCC 532.

> **50.** When the Court monitors the investigation, there is already departure inasmuch as the investigating agency informs the Court about the progress of the investigation. Once the constitutional Court monitors the inquiry/ investigating which is only done in extraordinary circumstances and in exceptional situations having regard to the larger public interest, the inquiry/ investigation into the crime under the PC Act against public servants by CBI must be allowed to have its course unhindered and uninfluenced and the procedure contemplated by section 6-A cannot be put at the level which impedes exercise of constitutional power by the Supreme Court under Articles 32, 136 and 142 of the Constitution. Any other view in this regard will be directly inconsistent with the power conferred on the highest constitutional Court."

61. Mr. Desai, the learned Senior Counsel, canvassed a forceful submission that the aforesaid determination of law is restricted to the cases where the Court monitors investigation. Secondly, the deviation from the statutory requirement is permissible only when the Supreme Court exercises its plenary jurisdiction under Articles 32 and 142 of the Constitution. A High Court exercising jurisdiction under Article 226 of the Constitution, where it does not monitor the investigation, is not within its rights in overriding the statutory provision. Since in the instant case the Division Bench simply ordered preliminary enquiry and the petitions were disposed of, the aforesaid pronouncement is of no assistance to the respondent – CBI, urged Mr. Desai.

62. In order to properly appreciate the aforesaid

submission, it is imperative to consider the backdrop of the decision in the case of ***M.L.Sharma*** (supra). The aforesaid question came up for consideration before the Supreme Court, in the backdrop of the fact that the inquiry and investigation into the allocation of the coal blocks were being monitored by the Supreme Court and CBI had submitted report about the status of the progress made in that regard. In the said case, the Supreme Court had put two queries to the learned Attorney General. The second was, "why the approval of the Government (under Section 6A) was necessary in respect of "Court monitored" or "Court directed" investigation". The submissions of the learned Attorney General in response to the second query were noted in paragraph 19 as under:

> **"19.** In response to the second query, the learned Attorney General submits that Section 6-A is in the nature of procedure established by law for the purposes of Article 21 and where consequences follow in criminal law for an accused, the Court is not at liberty to negate the same even in exercise of powers under Article 32 of Article 142. According to him, requirement of sanction under Section 6-A is to be interpreted strictly and cannot be waived under any circumstances. That the Court monitors or directs an investigation does not affect the basis of protection available under law and CBI cannot be asked to proceed with inquiry or investigation dehors the statutory mandate of Section 6-A. The learned Attorney General, thus, submits that Section 6-A which was a definite objective must be allowed to operate even in the cases where the investigation into the crimes under the PC Act is being monitored by the Court."

63. It would contextually relevant to note that the submissions advanced by Mr. Desai substantially resonate with the submissions of the learned Attorney General, as noted by the Supreme Court above.

64. In answering the aforesaid question, the Supreme Court adverted to the pronouncement of the Constitution Bench in the case of ***CPDR*** (supra). As the learned Attorney General sought to draw a distinction between the sphere of operation of the provisions contained in Section 6 and Section 6A, the Supreme Court observed as under:

> "53. The learned Attorney General is right that the two provisions, namely Section 6 and Section 6A are different provisions and they operate in different fields, but the principle of law laid down in respect of Section 6, in our view, can be extended while considering applicability of Section 6-A to the Court-monitored investigations. If Section 6 necessitates the prior sanction of the State Government before investigation is carried outby CBI in terms ofthat provision and the principle of law laid down by the Constitution bench of this Court is that the constitution courts are empowered to direct the investigation of a case by CBI and in such cases no prior sanction of the State Governemtn is necessary under Section 6 of the DSPE Act, there is no reason why such principle is not extended in holding that the approval of the Central Government is not necssary under Section 6A of the DSPE Act in a matter where the inquiry/investigation into the crime under the PC Act is being monitored by the Court. It is the duty of this Court that anti-corruption laws are interpreted and worked out in such a fashion that helps in minimising abuse of public office for private gain."
>
> (emphasis supplied)

65. The afore-extracted observation that there is no reason as to why the principle expounded in ***CPDR*** (supra) cannot

be extended to hold that the approval of the Central Government is not necessary under Section 6A of the DSPE Act in a matter where the inquiry/investigation into the crime under the PC Act is monitored by the Court, constitutes a complete answer to the submissions sought to be canvassed on behalf of the petitioner.

66. The observations of the Hon'ble Mr. Justice M. B. Lokur in the concurrent yet separate opinion, in paragraphs 95 and 98, put the matter beyond the pale of controversy. They read as under:

> "**95**. The question therefore is, can a statutory fetter such as Section 6-A of the Act bind the exercise of plenary power by this Court of issuing orders in the nature of a continuing mandamus under Article 32 of the Constitution ? The answer is quire obviously in the negative. Any statutory emasculation, intended or unintended, of the powers exercisable under Article 32 of the Constitution is impermissible.
>
> **98**. The law laid down by the Constitution Bench vis-a-vis a High Court exercising judicial review under Article 226 of the Constitution and a statutory restriction under section 6 of the Act, would apply (perhaps with greater vigour) mutatis mutandis to the exercise of judicial review by this Court under Article 32 of the Constitution with reference to a statutory restriction imposed by section 6-A of the Act. That being so, section 6-A of the Act must be meaningfully and realistically read, only as an injunction to the excutive and not as an injunction to a constitutional court monitoring an investigation under Article 32 of the Constitution in an exercise of judical review and of issuing a continuing mandamus."
>
> (emphasis supplied)

67. It is imperative to note that in both the opinions, support and sustenance was drawn from the pronouncement

of the Constitution Bench in the case of ***CPDR*** (supra). Indubitably, in ***CPDR*** (supra) the Supreme Court examined the contours of the authority of the High Court under Article 226 of the Constitution.

68. In our view, from a fair reading of the pronouncement of the Supreme Court in the case of ***M. L. Sharma*** (supra), it becomes evident that the issue of necessity of prior sanction in a Court directed investigation was also under consideration. Undoubtedly, the Supreme Court answered the question which arose for consideration with reference to Court monitored investigation. Pertinently, the Supreme Court, did not observe that such approval is required when it is a case of Court directed investigation in contradistinction to Court monitored investigation.

69. The matter can be looked at from a slightly different perspective. The protection envisaged by Section 17A of the PC Act is stage controlled. Such approval is warranted at the stage of enquiry, inquiry and investigation. It would imply that the justifiability of the inquiry or investigation is to be evaluated by the competent authority in time context. Viewed through this prism, the Court monitored investigation, which is in the nature of continuing mandamus, cannot be said to

be the only situation under which investigation sans such approval can be sustained. We do not find any qualitative difference in a court-monitored and court-ordered investigation, in the matter of ordering an inquiry or investigation sans approval, in exercise of power of judicial review. The distinction sought to be made between a Court monitored and Court directed / ordered investigation thus seems artificial. Once a constitutional court, examines and satisfies itself about the necessity and desirability of the inquiry or investigation into the alleged crime, the requirement of approval by the competent authority is substituted by a more judicious determination. In the instant case, the observations of the Division Bench in the order dated 5th April, 2021, explicitly make out such satisfaction.

70. Mr. Desai attempted to open a new front by canvassing a submission that the plenary power which is vested in the Supreme Court under Articles 32 and 142 of the Constitution, being not available to a High Court, the statutory prescriptions cannot be lightly brushed aside entailing serious prejudice to the fundamental rights of an accused. In order to buttress the aforesaid submission, reliance was sought to be placed on the judgment of the

Supreme Court in the case of ***Paramjit Kaur vs. State of Punjab.***[24] In the said case, in the context of the bar envisaged by Section 36(2) of the Protection of Human Right Act, 1993 ('the Human Rights Act'), which precluded the commission from inquiring into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed, the Supreme Court held that the power and jurisdiction of the Supreme Court under Article 32 of the Constitution cannot be curtailed by any statutory limitation including those contained in Section 36(2) of the Human Rights Act.

71. The aforesaid pronouncement reiterates the principle that the statutory provisions do not impinge upon the plenary powers of the constitutional court under Articles 32 of the Constitution. This pronouncement is of little assistance to advance the cause of the petitioner's submission that the width of power under Article 226 of the Constitution is not of the same amplitude as that of the Supreme Court under Article 32 of the Constitution of India. In contrast, it is well neigh settled that under the constitutional scheme, the jurisdiction conferred on the High Court is in the same wide terms as the jurisdiction under

24 (1999) 2 SCC 131.

Article 32 of the Constitution. In fact, the jurisdiction of the High Court under Article 226 is much wider as the High Courts are required to exercise the jurisdiction not only for enforcement of fundamental rights but also for enforcement of any legal right.

72. It was next urged that it is the duty of the Courts to protect the rights which emanate from the due observance of the procedure established by law. Rigorous observance of the procedure is a constitutional imperative, however inconvenient it may be in a given situation. Attention of the Court was invited to the decision of the Supreme Court in the case of ***Prabhu Dayal Deorah vs. The District Magistrate, Kamrup and others,***[25] wherein the following observations were made:

> "**21.** .....The history of personal liberty is largely the history of insistence on observance of procedure. And observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only, guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law. The need today for maintenance of supplies and services essential to the community cannot be over-emphasized. There will be no social security without maintenance of adequate supplies and services essential to the community. But social security is not the only goal of a good society. There are other values in a society. Our country is taking singular pride in the, democratic ideals enshrined in its Constitution and the most cherished of these ideals is personal liberty. It would indeed be ironic if, in. the name of social security, we would sanction the subversion of this liberty. We do not pause to

25 AIR 1974 SC 183.

> consider whether social security is more precious than personal liberty in the scale of values, for, any judgment as regards that would be but a value judgment on which opinions might differ. But whatever be its impact on the maintenance of supplies and services essential to the community,'when a certain procedure is prescribed by the Constitution or the laws for depriving a citizen of his personal liberty, we think it our duty to see that that procedure is rigorously observed, however strange this might sound to some ears."
>
> (emphasis supplied)

73. Mr. Desai would further urge that no Court, including the Supreme Court, can give directions contrary to the statutory provisions. To this end, reliance was placed on the judgment of the Supreme Court in the case of ***Central Bureau of Investigation and others vs. Keshub Mahindra and others,***[26] wherein in the context of an apprehension that the 1996 judgment of the Supreme Court in ***Bhopal Gas Leak Case,*** whereby the Supreme Court had directed the trial Court to frame charges under Section 304A instead of Section 304 (Part II) of the IPC, the Sessions Court would feel helpless in framing charges for more serious offences, the Supreme Court held that the apprehension was wrong and without any basis and went on to postulate that, "No decision by any Court, this Court not excluded, can be read in a manner as to nullify the express provisions of an Act or the Code and the 1996 judgment never intended to do so."

---

26 (2011) 6 SCC 216.

74. Reliance was also placed on another judgment of the Supreme Court in the case of ***M. S. Ahlawat vs. State of Haryana and another,***[27] wherein the Supreme Court, set aside the conviction of the petitioner therein, for the offence punishable under Section 193 of the IPC, for which the petitioner was convicted by the Supreme Court. It transpired that the procedure prescribed under Section 340 of the Code was not followed before petitioner was so convicted. In that context, the Supreme Court observed that:

> "To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience. We, therefore, unhesitatingly set aside the conviction of the petitioner for the offence under Section 193 IPC."

75. Reliance was also placed on the judgment of the Supreme Court in the case of ***Union of India and another vs. Kirloskar Company Ltd.,***[28] wherein the High Court had directed the authorities under the Customs Act to decide the claim for refund, with a further rider that the claim shall not be rejected on the ground that it was time-barred. Setting aside the said direction, the Supreme Court held that the power conferred by Articles 226/227 of the Constitution is designed to effectuate the law, to enforce the rule of law and

---

27 (2000) 1 SCC 278.

28 (1996) 4 SCC 453.

to ensure that the several authorities and organs of the State act in accordance with law. It cannot be invoked for directing authorities to act contrary to law.

76. An earnest endeavour was made to draw support from the Seven Judge bench judgment of the Supreme Court in the case of ***A. R. Antulay vs. R. S. Naik and another,***[29] wherein the Supreme Court recalled the direction (in ***R. S. Nayak vs. A. R. Antulay -[(1984) 2 SCC 183])*** transferring the trial under the Criminal Law Amendment Act, 1952, from the Court of Special Judge, Bombay to the High Court of Bombay. It was observed that in giving the directions the Supreme Court infringed the constitutional safeguards granted to a citizen or to an accused and injustice resulted therefrom. It was just and proper for the Court to rectify and recall that injustice, in the peculiar facts and circumstances of the said case.

77. A judgment of a Division Bench of this Court in the case of ***IDBI Bank Ltd. vs. Aditya Logistics (I) Pvt. Ltd. and others***[30] was also pressed into service to bolster up the submission that in exercise of jurisdiction under Article 226 of the Constitution the High Court cannot direct any

29 (1988) 2 SCC 602.

30 2017 (5) Mh.L.J. 69.

authority including a statutory tribunal to act contrary to the statutory provisions.

78. Mr. Lekhi, joined the issue by canvassing a submission that the analogy sought to be drawn, from the aforesaid pronouncements, is misplaced. We are persuaded to agree with the submissions of Mr. Lekhi. A case where the constitutional court passes an order, which turns out to be in derogation of the statutory provision or prescribed procedure in exercise of ordinary jurisdiction or for that matter writ jurisdiction, stands on a different footing than a case where the constitutional court invokes the plenary jurisdiction vested under Article 32 or 226 of the Constitution for enforcement of the fundamental rights and upholding the rule of law. In the latter cases the statutory restrictions do not impede the exercise of the jurisdiction under Article 32 or 226 of the Constitution which is of wide plenitude. It bears repetition to record that the pronouncement of the Supreme Court in the case of ***CPDR*** (supra) sets the issue at rest.

79. This takes us to the judgment of the Supreme Court in the case of ***Yaswant Sinha*** (supra) on which heavy reliance was placed by Mr. Desai. The review petitions in the said reported judgment, arose out of the judgments whereby the

writ petitions which sought investigation in the matter of purchase of Rafale Fighter Jets, were dismissed. The review petitions were disposed of by two separate yet concurring opinions. In the judgment delivered by Hon'ble Mr. Justice K. M. Joseph, the applicability of the bar contained in Section 17A of the PC Act, where a prayer is made for directing registration of the FIR against a public servant, was adverted to. His Lordship, observed as under:

> "**114**. The Constitution Bench in Lalita Kumari(supra), had before it, the CBI Crime Manual. It also considered the decision of this Court in P. Sirajuddin (supra) which declared the necessity for preliminary inquiry in offences relating to corruption. Therefore, the petitioners may not be justified in approaching this Court seeking the relief of registration of an FIR and investigation on the same as such. This is for the reason that one of the exceptions where immediate registration of FIR may not be resorted to, would be a case pointing fingers at a public figure and raising the allegation of corruption. This Court also has permitted preliminary inquiry when there is delay, laches in initiating criminal prosecution, for example, over three months. A preliminary inquiry, it is to be noticed in paragraph 120.7, is to be completed within seven days.
>
> **115**. The petitioners have not sought the relief of a preliminary inquiry being conducted. Even assuming that a smaller relief than one sought could be granted, there is yet another seemingly insuperable obstacle.
>
> .....
>
> **117**. In terms of Section 17A, no Police Officer is permitted to conduct any enquiry or inquiry or conduct investigation into any offence done by a public servant where the offence alleged is relatable to any recommendation made or decision taken by the public servant in discharge of his public functions without previous approval, inter alia, of the authority competent to remove the public servant from his Office at the time when the offence was alleged to have been committed. In respect of the public servant, who is involved in this case, it is clause (c), which is applicable. Unless, therefore, there is previous approval, there could be neither

inquiry or enquiry or investigation. It is in this context apposite to notice that the complaint, which has been filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018, moved before the first respondent-CBI, is done after Section 17A was inserted. The complaint is dated 04.10.2018. Paragraph 5 sets out the relief which is sought in the complaint which is to register an FIR under various provisions. Paragraphs 6 and 7 of the complaint are relevant in the context of Section 17A, which reads as follows:

> "6. We are also aware that recently, Section 17(A) of the act has been brought in by way of an amendment to introduce the requirement of prior permission of the government for investigation or inquiry under the Prevention of PC Act.
>
> 7. We are also aware that this will place you in the peculiar situation, of having to ask the accused himself, for permission to investigate a case against him. We realise that your hands are tied in this matter, but we request you to at least take the first step, of seeking permission of the government under Section 17(A) of the Prevention of PC Act for investigating this offence and under which, "*the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month*".

118. Therefore, petitioners have filed the complaint fully knowing that Section 17A constituted a bar to any inquiry or enquiry or investigation unless there was previous approval. In fact, a request is made to at least take the first step of seeking permission under Section 17A of the 2018 Act. Writ Petition (Criminal) No. 298 of 2018 was filed on 24.10.2018 and the complaint is based on non-registration of the FIR. There is no challenge to Section 17A . Under the law, as it stood, both on the date of filing the petition and even as of today, Section 17A continues to be on the Statute Book and it constitutes a bar to any inquiry or enquiry or investigation. The petitioners themselves, in the complaint, request to seek approval in terms of Section 17A but when it comes to the relief sought in the Writ Petition, there was no relief claimed in this behalf.

119. Even proceeding on the basis that on petitioners complaint, an FIR must be registered as it purports to disclose cognizable offences and the Court must so direct, will it not be a futile exercise having regard to Section 17A . I am, therefore, of the view that though otherwise the petitioners in Writ Petition (Criminal) No. 298 of 2018 may

> have made out a case, having regard to the law actually laid down in Lalita Kumari (supra), and more importantly, Section 17A of the Prevention of PC Act, in a Review Petition, the petitioners cannot succeed. However, it is my view that the judgment sought to be reviewed, would not stand in the way of the first respondent in Writ Petition (Criminal) No. 298 of 2018 from taking action on Exhibit P1-complaint in accordance with law and subject to first respondent obtaining previous approval under Section 17a of the Prevention of PC Act."

80. Banking upon the aforesaid observations, especially the observations in paragraph 115 that Section 17A of the PC Act seemed to be an insuperable obstacle in granting the relief of preliminary inquiry, Mr. Desai urged, with a degree of vehemence, that the order of the Division Bench directing preliminary enquiry cannot be so construed as to perpetuate the mistake. Since the Supreme Court has emphasized the peremptory nature of the approval envisaged by Section 17A of the PC Act, the investigation must be interdicted at this stage.

81. Mr. Lekhi, the learned ASG submitted that the aforesaid observations, which form part of the order of Hon'ble Mr. Justice Joseph cannot be construed as an order of the Court. Since the majority has not adverted to the provisions contained in Section 17A of the PC Act, the aforesaid observations, do not command any precedential value. In any event, according to Mr. Lekhi, the aforesaid

observations are contrary to the judgments of the Supreme Court in the cases of ***CPDR*** and ***M.L. Sharma*** (supra).

82. In order to lend support to the submission that the aforesaid observations in respect of applicability of Section 17A, do not command precedential value, Mr. Lekhi placed reliance on the judgment of the Supreme Court in the cases of ***Kaikhosrou (Chick) Kavasji Framji vs. Union of India***[31] and ***Rameshbhai Dabhai Naika vs. State of Gujarat,***[32] wherein the legal position as to when the observations in the concurring judgment constitute binding precedent was exposited.

83. We are not persuaded to adopt a doctrinaire approach and delve into the aspect of binding efficacy of the afore-extracted observations in the case of ***Yashwant Sinha*** (supra). In our considered opinion, from the perusal of the aforesaid observations, it becomes abundantly clear that two factors weighed with the Supreme Court. First, in the context of the nature of allegations of corruption against a public figure, the writ petitioners could not have sought the relief of registration of FIR directly. Second, though the petitioners were aware of the impediment for the investigating agency in entering upon the investigation, in view of the bar under

31 (2019) 20 SCC 705.

32 (2012) 3 SCC 400.

Section 17A, yet no relief was sought in that behalf. In this backdrop, the observations were made that even if it is assumed that the allegations in the petitioner's complaint disclosed congnizable offences and the Court must direct the registration of the FIR, would it not be a futile exercise having regard to Section 17A.

84. In our understanding, the afore-extracted observations in the case of ***Yashwant Sinha*** (supra), cannot be read *de hors* the context in which those observations were made. The aforesaid observations, with respect, do not lay down a proposition that even when a constitutional Court is convinced about the justifiability of the cause and necessity of a fair and impartial investigation by an independent agency, Section 17A operates as a fetter on its power to order such investigation. On a proper construction, in our view, the aforesaid observations underscore the restrictions to inquire and investigate qua the investigating agency and not against the Court which finds it expedient to exercise the jurisdiction under Article 226 of the Constitution.

85. **Question No.(iii): Whether FIR beyond the ambit of the order of Division Bench:**

A two-pronged submission was advanced in support of

the challenge that the registration of the FIR and the consequent investigation transgresses the ambit of the order of the Division Bench. One, the issues of transfer and posting of the police officials and the reinstatement in service of Mr. Sachin Vaze and entrustment of important and sensitive cases, were not at all referred to in the complaint of Dr. Jayshree Patil nor in the letter of Mr. Param Bir Singh. Thus, this Court had no occasion to consider those issues and order an inquiry therein. Two, the Division Bench order manifests a clear contra-indication that the said aspect was beyond the province of the preliminary enquiry entrusted to respondent no.2.

86. We have been taken through the letter of Mr. Param Bir Singh to bolster up the submission that there is nothing which can be even remotely related to the alleged exercise of undue influence in the matter of transfer and posting of the police officials by the petitioner. Attention of the Court was also invited to the observations in paragraph 87 of the order of the Division Bench, which reads as under:

> "**87**. We also make it clear that Shri Param Bir shall be at liberty to raise grievances, if any, in regard to transfers and postings of police officers and for enforcement of the directions in **Praksh Singh** (supra) before the appropriate forum in accordance with law, if so adviced."

87. As the Division Bench had reserved the liberty to Mr. Param Bir Singh to raise grievances, if any, in regard to the transfer and postings of police officials before the appropriate forum, it implied that the Division Bench did not consider the said aspect, much less satisfied about the necessity of ordering enquiry into that matter, submitted Mr. Desai. Resultantly, the registration of the FIR and investigation in respect of the matters, which were not at all adverted to by the Division Bench, amounts to venturing into investigation in matters which otherwise fall within the domain of the State Government and thus wholly impermissible under Section 6 of the DSPE Act. A strong reliance was placed on the judgment of the Supreme Court in the case of ***Mayawati*** (supra).

88. In the context of aforesaid challenge we deem it appropriate to record that in Criminal Writ Petition No.1903 of 2021, preferred by the State of Maharashtra, assailing the legality of registration of the FIR incorporating the allegations in respect of exercise of undue influence over the transfer and posting of the police officials and the reinstatement of Mr. Sachin Vaze and entrustment of important and sensitive

cases to him, we have elaborately dealt with the challenge based on the provisions of Section 6 of the DSPE Act and the judgment of the Supreme Court in the case of ***Mayawati*** (supra). [The said Writ Petition No.1903 of 2021 is also disposed of simultaneously by a separate judgment.]. We are of the view that it may not be necessary to burden this judgment by incorporating all those reasons once more.

89. It would be suffice to note that the ratio in the case of ***Mayawati*** (supra) is that in a case where there is no consent of the State under Section 6 of the DSPE Act and the authority to investigate springs from the order of the constitutional court, in the absence of direction in the order of the Court, the investigating officer is not free to resort to the provisions contained in Section 157 of the Code to investigate into a matter which is not covered by the order of the Court. The aforesaid ratio of the judgment of the Supreme Court in the case of ***Mayawati*** (supra) is required to appreciated in the context of its factual backdrop. In the said case, the Court was dealing with the illegality / irregularity committed by the officers and the persons who carried out the 'Taj Heritage Corridor Project' and the disbursement of the amount of Rs.17 Crores, which was allegedly released

without sanction, in September, 2002. In contrast, purportedly on the basis of the order of the Supreme Court, another FIR was registered against the petitioner therein with the allegations of amassing assets disproportionate to the known sources of income from the year 1995 to 2003. In such fact situation, the Supreme Court held that there was no occasion for the Supreme Court to consider the said allegations of amassing disproportionate assets and, resultantly, the registration of the FIR was without jurisdiction. The aforesaid pronouncement, in our view, does not apply with equal force to the facts of the case at hand.

90. We have extracted above, the allegations in the letter of Shri Param Bir Singh. It was alleged that the petitioner was indulging in misdeeds and malpractices. Mr. Sachin Vaze was called at the residence of the petitioner several times. He was given a target to accumulate Rs.100 Crores a month. The Personal Secretary of the petitioner allegedly conveyed the direction to collect the funds to Shri Sanjay Patil, ACP. Both the officers related the direction to collect funds to the then Commissioner of Police. Apart from the allegations that the petitioner directed the Police Officers to collect funds, there are allegations as regards the interference in the matters

which were being investigated by the police officers. The petitioner was repeatedly calling the officers and giving them instructions in respect of the course to be adopted by them in the performance of their official duty. They were instructed to carry out official assignments and collection schemes including financial transactions.

91. If these allegations are considered in juxtaposition with the stated claim that it was part of the duty of the petitioner to take a call on the recommendations made by the Police Establishment Board and/or take decision in the matter of the transfer and posting of the police officials, in view of the provisions contained in the Maharashtra Police Act, 1951, the aspect of transfer and posting of the police officials cannot be said to be wholly unconnected with the subject matter of the inquiry, ordered by the Division Bench. Whether the officers were transferred and posted to achieve the alleged desired objective of collection of funds, whether the officers who were amenable to the influence of the petitioner were brought in so as to allegedly interfere with the course of investigation, whether the officers, who were allegedly instructed to carry out official assignments and discharge the public duty in a particular manner, were posted at particular position are all

matters which are inextricably intermingled with the allegations against the petitioner.

92. Question No.(iv): Whether a case for quashment:

A strenuous effort was made to demonstrate that the allegations in the FIR, even if they are taken at their face value and accepted in their entirety, do not, *prima facie* constitute any offence. Multi-fold grounds were urged. First, FIR is bereft of facts to make out the case against the petitioner. Second, it is based on vague and hearsay material. Third, there is no material to indicate the commission of the offence punishable under Section 7 of the PC Act and 120B of the Penal Code. Fourth, even if taken at face value, the acts attributed to the petitioner do not traverse beyond the stage of preparation. Lastly, the fact that the FIR alleges that the petitioner and unknown others have attempted to obtain undue advantage for improper and dishonest performance of their public duty and that the petitioner conspired with the unknown others, despite holding a preliminary enquiry, justifies an inference that nothing of substance was found in the preliminary enquiry.

93. The audicity of the submission that the FIR does not disclose a *prima facie* offence is belied by the hard facts of

the case. At the cost of repeatation, we are constrained to record that in the backdrop of the allegations in the letter of Mr. Param Bir Singh, the Division Bench, while directing independent probe by CBI, recorded in no uncertain terms that:

> **74**. While considering the Criminal Writ Petition on merits, we find that one other aspects cannot be overlooked. Shri. Kumbhkoni has not urged that the complaint of Dr. Patil does not disclose any cognizable offence. ……."
>
> **75**. ……. The information furnished therein discloses commission of cognizable offences by Shri Deshmukh and in our *prima facie* view, should have been acted upon in the manner required by the CrPC, and as judicially interpreted by the Supreme Court in ***Lalita Kumari*** (supra). ……."
>
> (*para 75.)*
>
> **80**. "…… Such allegations, therefore, cannot remain unattended and are required to be looked into in the manner known to law when, *prima facie,* they indicate commission of a cognizable offence. ……."
>
> (*para 80.)*

94. In the light of the aforesaid observations, the submission on behalf of the petitioner that the allegations in the FIR do not make out a *prima facie* case does not deserve to be countenanced, at least, at this stage and before this forum.

95. Undaunted and at his combative best, Mr. Desai would urge that despite the aforesaid observations, since the Division Bench in paragraph 84 of the order made it clear that the observations made in the said order were without

prejudice to the rights and contentions of the parties, who might figure in the position of the accused in future, the petitioner cannot be deprived of the opportunity to agitate the ground that the FIR and the consequent investigation deserve to be quashed as they constitute an abuse of the process of the court.

96. In view of the aforesaid submission, we deem it expedient to consider the challenge and record brief reasons. To begin with, the claim that the FIR, as its stand, is bereft of facts and material looses sight of the fact that the FIR makes reference to the annexures which include the complaint of Dr. Jayshree Patil and the letter of Mr. Param Bir Singh. To urge that only the allegations in the FIR are determinative and not the documents annexed thereto and attendant circumstances is again not in consonance with law. To ascertain as to whether there is a reason to suspect commission of a cognizable offence, the investigating officer can, in law, look into the allegations in the FIR, documents annexed to FIR, the evidence collected and the attendant circumstances as well. A profitable reference, in this context, can be made to the observations of the Supreme Court in the case of ***State of Haryana and others vs. Bhajanlal and others,***[33] wherein

33 1992 Supp. (1) SCC 335.

the import of the expression, "reason to suspect the commission of an offence" and the material which can be taken into account to arrive at such inference, were expounded as under:

> "48. One should not lose sight of the fact that Section 157(1) requires the police officer to have reason to suspect only with regard to the commission of an offence which he is empowered under Section 156 to investigate, but not with regard to the involvement of an accused in the crime. Therefore, the express, "reason to suspect the commission of an offence" would mean the sagacity of rationally inferring the commission of a cognizable offence based on the specific articulate facts mentioned in the first information report as well as the annexures, if any, enclosed and any attending circumstances which may not amount to proof. In other words, the meaning of the expression "reason to suspect" has to be governed and dictated by the facts and circumstances of each case and at that stage the question of adequate proof of facts alleged in the first information report does not arise."

97. The submission that despite preliminary enquiry respondent no.2 could not unearth any material except the complaint of Dr. Jayashree Patil and the letter of Mr. Param Bir Singh, the very material which was before the Division Bench while ordering preliminary enquiry, though alluring at the first blush, is not well grounded in law. It misconstrues the scope of preliminary enquiry completely. The purpose of preliminary enquiry is not verify the veracity or otherwise of the information received but only to ascertain whether the information discloses a cognizable offence.

98. It was next urged on behalf of the petitioner that the allegations in the letter of Mr. Param Bir Singh are not based on his personal knowledge and do not deserve consideration being hearsay. The FIR is thus based on legally inadmissible material. To buttress the aforesaid submission Mr. Desai, banked upon the pronouncement of the Supreme Court in the case of ***Kalyan Kumar Gogoi vs. Ashutosh Agnihotri***[34] wherein the juristic connotation of the term 'hearsay' was explained.

99. We find it rather difficult to accede to the submission that the allegations in the letter of Mr. Param Bir Singh, deserve to be discarded, at this stage, on the ground of being hearsay. At the stage of consideration of the prayer for quashing the FIR this Court is expected to look into only the allegations so as to find out whether an offence is *prima facie* disclosed or not? If the answer is in the affirmative, the truthfulness or otherwise of the allegations is a matter for investigation and trial.

100. A faint attempt was made to draw home the point that, even if the allegations in the FIR are taken at their face value, they would, at best, indicate preparation to extort money and

---

34 (2011) 2 SCC 532.

nothing beyond that. There is no allegation that the petitioner, in fact, accepted or attempted to accept money. Reliance was sought to be placed on the judgments of the Supreme Court in the case of ***Koppula Venkat Rao vs. State of A.P.***[35] and Lahore High Court in the case of ***High Court Bar Association vs. Crown***[36] wherein, the distinction between an attempt to commit a crime and intention and preparation for its commission was expounded.

101. The distinction between attempt and preparation is well recognized. However, the dividing line between a mere preparation and attempt is often thin. Its determination is rooted in facts. In the case at hand, the submission on behalf of the petitioner that, at best, the direction to the police officers to collect funds was a preparatory act, with no consummated offence, proceeds on the premise as if that is the only act attributed the petitioner. A bare perusal of the complaint of Dr. Jayshree Patil and the letter of Mr. Param Bir Singh annexed thereto, would *prima facie* indicate that the petitioner allegedly identified the source from which the funds were to be collected, the probable number of such units, and the amount to be collected from each of them. We

---

35 (2004) 3 SCC 602.

36 1941 Indian Law Reporter 796.

therefore do not deem it appropriate to delve deep into the question as to whether those acts fall in the realm of preparation only.

102. In the backdrop of the aforesaid nature and the gravity of the allegations made in the complaint of Dr. Jayshree Patil, annexure thereto and the observations made by the Division Bench, we are afraid that we would be justified in delving deep into the thickets of facts, at this stage of the proceedings. It is trite that the inherent powers to quash the FIR/prosecution are required to be exercised sparingly and in exceptional cases. Ordinarily, the inherent powers ought not be exercised to stifle a legitimate prosecution. At the stage of investigation, when the truth is yet to be unearthed, this Court cannot embark upon the inquiry into the correctness or otherwise of the allegations. We agree with the submissions of Mr. Lekhi that at this stage when investigation is underway any attempt to sieve through the material with a fine gauze to ascertain the existence or otherwise of the ingredients of the offences is uncalled for. It is trite that FIR is not an encyclopedia and the purpose of investigation is to unearth the truth.

103. The last submission on behalf of the petitioner that

respondent no.2 has shied away from naming the alleged co-conspirators of the petitioner and continues to proceed with the investigation with the specious and convenient refrain of, "unknown others" gave us a cause for anxious consideration. During the course of the hearing, in the backdrop of the nature of the allegations, we called upon Mr. Lekhi, to clear the stand of respondent no.2 as regards the possibility of the complicity of other persons, apart from the petitioner. Mr. Lekhi, the learned ASG, assured the Court that the investigation would be conducted in scrupulous adherence to the mandate of the order of the Division Bench. Nobody would be spared. Respondent no.2 will not play favourite. It would be an unsparing investigation irrespective of the rank.

104. Before parting, by way of abundant caution we clarify that the observations hereinabove have been made for the purpose of determining the justifiability of the prayer to quash the FIR and the investigation. And these observations shall not be construed to have any bearing on the Writ Petitions and other proceedings filed by Mr. Param Bir Singh and Mrs. Rashmi Shukla, which shall be determined on their own merits.

105. For the forgoing reasons, the petition deserves to be

dismissed. Hence, the following order:

: O R D E R :

(i) The petition stands dismissed.

(ii) The Registrar (Judicial) is directed to return the sealed envelope containing the report to the concerned Investigating Officer.

(iii) Rule stands discharged.

[N. J. JAMADAR, J.] **[S. S. SHINDE, J.]**

At this stage, Mr. Desai, the learned Senior Counsel for the petitioner, submitted that having regard to the substantial question of law of general importance, which according to him, has arisen for consideration in this petition, the effect and operation of this judgment be stayed to facilitate the petitioner to raise the issue before the Supreme Court.

Mr. Tushar Mehta, the learned Solicitor General, opposes the prayer. It was submitted that no interim relief was in operation during the pendency of this petition. Nor any substantial question of law arises for consideration.

We have considered the submissions. We are of the view that in view of the consideration which we have bestowed to the submissions canvassed across the bar, in this judgment, there is no justifiable reason to stay the effect and operation of this judgment. Hence, oral application for stay stands rejected.

[N. J. JAMADAR, J.] **[S. S. SHINDE, J.]**