

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 26TH DAY OF APRIL 2022 / 6TH VAISAKHA, 1944

CRL.REV.PET NO. 571 OF 2020

(AGAINST THE ORDER OF THE COURT OF THE ENQUIRY COMMISSIONER AND
SPECIAL JUDGE, THIRUVANANTHAPURAM IN CRL.M.P.NO.242/2020 DATED
26.08.2020)

REVISION PETITIONER/S:

STATE OF KERALA

REPRESENTED BY THE DIRECTOR, VIGILANCE AND ANTI CORRUPTION
BUREAU, VIGILANCE DIRECTORATE, PALAYAM P O,
THIRUVANANTHAPURAM-PIN-695033,

SPL.GP.SRI.A.RAJESH

RESPONDENTS/COMPLAINANT AND ACCUSED:

- 1 SRI. RAMESH CHENNITHALA MLA,
LEADER OF OPPOSITION, KERALA LEGISLATIVE ASSEMBLY,
THIRUVANANTHAPURAM.
- 2 P.B. NOOH IAS
DISTRICT COLLECTOR AND CHAIRMAN, DISTRICT DISASTER
MANAGEMENT AUTHORITY, PATHANAMTHITTA - 689645.
- 3 SRI. TOM JOSE,
FORMER CHIEF SECRETARY TO GOVERNMENT OF KERALA, PIN-
695001.
- 4 THE MANAGING DIRECTOR
KERALA CLAYS AND CERAMIC PRODUCTS LIMITED, KANNUR - 670561.

BY ADVS.
SRI.T.ASAFALI
SMT.LALIZA.T.Y.

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON
24.02.2022, THE COURT ON 26.04.2022 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.R.P.No.571 12020

Dated this the 26th day of April 2022

ORDER

The State, represented by the Director, Vigilance and Anti Corruption Bureau, assails Annexure-C order of the Enquiry Commissioner and Special Judge, Thiruvananthapuram, by which the Special Judge directed the VACB to conduct a preliminary enquiry into the allegations raised in Crl.M.P.242/2020, filed by the first respondent herein and to file report within 40 days.

2. The entire facts as is discernible from the records produced in the revision and the records produced by the first respondent is narrated as follows;

3. The first respondent herein is the leader of opposition in the Kerala Legislative Assembly. The second respondent is the District Collector, Pathanamthitta, who is also the Chairman of District Disaster Management Authority. The third respondent is the former Chief Secretary of the State of Kerala and the 4th respondent is the Managing Director of Kerala Clays and Ceramic Products Ltd. Kannur., a public limited company, wholly owned and controlled by Government of Kerala. During the unprecedented rains in August 2018, huge quantity of sand got

deposited in Pampa-Triveni Sangamam in Pathanamthitta area. According to the complainant, the Forest and Wild Life Department is the custodian of sand and silt accumulated in the river and its disposal requires approval of the Central Government. The Central Government, by F.No.8-2/19/FC dated 26/2/2019 had granted one time permission for removal of sand and silt accumulated at Pampa-Triveni area, subject to certain conditions. Accordingly, the Principal Conservator of Forest made an assessment of the sand accumulated at Pampa alone as 90,000 M3. Government by various Orders issued through the Forest and Wild Life Department, during the period May 2019, granted sanction to remove and sell a quantity of 5000 M3 of sand through e auction , 50,000 through direct sale and 20000 M3 of sand, free of cost to Travancore Devaswom Board for construction at Nilakkal Base camp. According to the first respondent, based on the orders of the State Forest Department and the Central Government, Principal Chief Conservator of Forest tried for bulk sale through e-auction fixing seigniorage rate at Rs/2777M3. But none participated in the e-auction. Thereafter, with the permission of the Government, sale was ordered to be conducted at a lesser rate of DSR 2016. According to the first respondent, however, till 2019 November, the Travancore Devaswom Board removed only a very limited quantity of sand.. At the same time, the Forest Department was waiting for approval of the Chief Secretary regarding certain proposed changes. While so, the Chief Secretary along with some officials and the State Police Chief is

alleged to have travelled to Pampa, on the eve of his demitting the office and allegedly gave instructions to the District Collector to permit Kerala Clays and Ceramic Products, Kannur, to remove sand, free of cost. Accordingly, the District Collector, in exercise of his powers as the Chairman of the Disaster Management Committee, issued Annexure B order on 30/5/2020, directing the removal of debris deposited at Pampa Triveni area during unprecedented rain and deluge in 2018. It was issued in exercise of the powers of the District Collector as the Chairman, Disaster Managing Committee, by invoking section 34 (d) of the National Disaster Management Act 2005. It was stated therein that, during the above period of unprecedented rain and deluge, debris got accumulated at a length of 2290 meter and it was liable to be urgently removed to ensure that the free flow of Pampa river was restored, to increase the capacity of the river and to avoid floods in future. It permitted the Kerala Clays and Ceramic Products Kannur to remove the debris within a stipulated time. A sub committee headed by Sub Collector, Thiruvalla, was directed to supervise the proper removal. The company was directed to complete the work before 30/6/2020.

4. Alleging that the above order of the Chairman of the Disaster Management Committee was consequent to a conspiracy entered into between the respondents 2 to 4 herein and consequent to the specific direction given by the then Chief Secretary, on the date of his visit, and that it involved huge corruption, a complaint was laid before the Enquiry

Commissioner & Special Judge, Thiruvananthapuram as Crl.M.C.No.242/2020. It was alleged in the complaint that the State Forest and Wild Life Department was the custodian of the sand and silt accumulated in the river and hence its disposal required prior approval of the Central Government. Annexure B order was issued by the authority without obtaining the prior approval of the Central Government. It was alleged that, the Forest Department, pursuant to permission granted by the Central Government had issued orders and had taken steps for removal of 90000 M3 of sand. However, the Chief Secretary did not take any action and kept the proceedings pending, it was alleged.

5. The crux of the allegation was that the then Chief Secretary not only purposefully desisted from performing his duties, but consequent to a clandestine visit made by him on 30/5/2020, oral instructions were given to the District Collector to ensure that orders were issued permitting the company to excavate the whole area and to transport sand at their own cost, to any destination of their choice and to obtain undue pecuniary advantage to them. It was stated that the company removed major portion of sand, which included 90000 M3, which was ordered to be transported by the Forest Department, being the competent authority. It was alleged that the company had sold the sand at the site to persons of their choice without depositing the sand for estimation by the committee authorized for the purpose. It was also alleged that the Sub Collector, Thiruvalla, who had headed the committee constituted for the purpose of quantifying the

accumulated sand and the modus of disposal, had submitted a report suggesting that the excavated sand could be deposited at the KSRTC bus stand at Pampa and Chakkumpalam parking ground No. 2, under safe custody. It was proposed to be done by adhering to all Rules. However, the Kerala Clays and Ceramic products Ltd. Entered the scene even before the Central Government had issued permission to the Forest Department to remove sand from Pampa River. It was further alleged in the complaint that the huge quantity of sand so deposited was wrongly projected as "debris" accumulated during floods. Pursuant to conspiracy entered into among the respondents to 2 to 4, official records were falsely created and fabricated to make it appear that permission was granted for removal of debris so as to enable the company to clandestinely remove sand from the forest land causing huge pecuniary loss to the Government. It was alleged that consequently they committed offence of theft under section 379 IPC. It was alleged that the company obtained undue pecuniary advantage and caused corresponding loss to the Government.

6. In the complaint filed by the leader of opposition, direction of the court was sought for investigation into the complaint by invoking the powers conferred under section 156 (C) Cr.P.C. and to monitor investigation to meet the ends of justice. It was allowed by the impugned order.

7. This order is under challenge in the present proceedings. Heard

the learned special Government Pleader for Vigilance and the counsel for the first respondent. The remaining respondent did not appear in spite of service of notice

8. Assailing the impugned order, the learned Special Government Pleader advanced four specific grounds of attack . Firstly, it was contended that sanction under section 17A of the PC Act was not obtained and hence the court below was not justified in forwarding the complaint for preliminary enquiry by the Vigilance. It was argued that, in the light of the decision reported in **Yashwant Sinha & Others v. CBI through its Director & Another[(2020)2 SCC 338)** , . in the absence of sanction under section 17A of the PC Act, the court below was not entitled to invoke section 156 (3) Cr.P.C. The second limb of the contention was that sanction under section 19 of the PC Act was a pre requisite for forwarding a complaint as laid down by the Supreme Court in **Anil Kumar v. Aiyappa (2013 (4) KLT 125(SC))**. According to the learned Special Government Pleader, this has been reiterated in the subsequent decisions. Thirdly, it was contended that the impugned order was passed by the authority without proper application of mind and the order did not disclose, due application of mind. The Supreme Court in **Priyanka Srivastava v. State of U.P.(2015 (2) KLT 451 (SC))** has laid down the parameters and the guidelines for dealing with an application seeking orders under section 156(3) Cr.P.C.. According to the learned Special Government Pleader, the impugned order- Annexure C did not disclose

the due application of mind by the learned Judge. Lastly, it was contended that the order under challenge in the proceedings was passed by the District Collector in exercise of his powers under Section 34 of the Disaster Management Act 2005. No suit or prosecution or other proceeding shall lie in any court against the Central Government or the National Authority or the State Government or the State authority or the District Authority or the local authority or any officer, regarding any action taken in good faith under the Disaster Management Act and was protected under section 73 of the Disaster Management Act. Consequently, the impugned order cannot survive in the light of Section 73 of the Disaster Management Act, it was contended.

9. Answering the above, the learned counsel for the complainant relied on the decision of this court in ***Shankara Bhat and Others v. State of Kerala and Others (2021 (5) KHC 248)*** to contend that offences relating to the misappropriation of funds, fraud, falsification of accounts, criminal breach of trust, conspiracy, etc, will not be protected by section 17A of the PC Act. It was also contended that the question of sanction under section 19 of the PC Act would arise only at the time of taking cognizance and does not arise while ordering preliminary enquiry, as done by the court below in the present case. It was contended that the direction given in Annexure C order to conduct a preliminary enquiry into the allegations and to file report was not an order passed in exercise of the jurisdiction under section 156(3) of the Act, but , by virtue of the

various decisions of the Supreme Court. Hence, Annexure C will not fall within the ambit of the decision in Anil kumar's case(supra) and other cases. It was also contended that the court below has complied with the directions contained in Priyanka's case and substantial documents were produced before the court below. After due application of mind, and perusing the matters and after exercise of proper jurisdiction, the court below passed Annexure C order. The last contention in answer to the contention of the learned special Government Pleader was that though orders are passed invoking section 34 of the Disaster Management Act in emergent situation, still such orders are not completely beyond justiciability on appropriate grounds.

10. Detailing the contentions set up by the learned Special Government Pleader, it was argued that Section 17A sanction was not obtained and in fact a request made by the petitioner for granting sanction under section 17A was rejected by virtue of Annexure A order. It was contended that the petitioner, by representation dated 11/6/2020 had sought sanction for conducting investigation into the order passed by the District Collector dated 30/5/2020. It was alleged that sanction was granted in violation of the procedure and it involved corruption. Sanction was rejected by Annexure A order, on the ground that the decision taken under section 34 of the Disaster Management Act was not justiciable under section 73 of the Disaster Management Act and hence Vigilance investigation cannot be granted. Evidently, this was not disclosed in the

complaint. Hence, the court below did not have the advantage of referring to it and satisfy itself that sanction was declined by the Government.

11. However, the learned counsel for the petitioner vehemently relied on the Sankara Bhatt's case (supra) to contend that in the case at hand, there was an allegation of corruption, breach of trust and theft. Consequently, in the light of Shankara Bhat's case, sanction under section 17A was not required. In Shankar's case, this court, after evaluation of the available materials on record, placed reliance on section 17A of the PC Act and held that question of prior sanction would arise only if any act done or any decision taken by the authority or recommendation made or decision taken by the public servant alone was under challenge. A clear distinction was made by this court between cases which involved challenge to a recommendation made or decision taken by the public servant and those instances of misappropriation of funds, falsification of accounts, fraud, criminal breach of trust, conspiracy, etc. It was held that when the challenge was in relation to the recommendation made or any decision taken by the public servant, sanction under section 17A was mandatory. However, in the case of latter sanction was not required since such acts cannot be deemed to be one done by the public servant in exercise of the authority conferred on him.

12. A copy of the complaint filed by the complainant was produced as Annexure R1(a). Specific allegation of the complainant was that the order passed by the Disaster Management Authority as Annexure R1(b)

produced therein dated 30./5/2020 was illegal. Of course, there is a vague allegation that by wrongly denoting the sand deposited as debris, by virtue of the order, it was proposed to be removed and thereby, the authority committed fraud. It was also stated that, in pursuance of a criminal conspiracy, accused persons committed the offence of theft which was punishable under section 379 IPC. In short, the allegation raised in the complaint clearly was that under the shadow of the impugned order, criminal activities were done. The essential point of challenge in the complaint was the legality and correctness of the order passed by the Collector in his capacity as the Disaster Management Authority. Hence, the decision taken by the authority was under challenge and necessarily, sanction under section 17A of the Act was warranted. In the case at hand, by Annexure A order produced along with the criminal revision, sanction sought was rejected. Annexure A order has not been challenged. Without challenging that order, the petitioner has approached this Court. It stands in the way of the court passing an order of investigation. As long as Annexure A remain, the action of the court in ordering the preliminary enquiry cannot be sustained. It is also to be noted that this fact was not disclosed in the complaint which disabled the court from applying its mind on this aspect. To that extent the impugned order cannot be legally sustained.

13. Though the learned special prosecutor vehemently contended that Annexure B order passed by the District Collector in his capacity as

District Management Authority is not justiciable, by virtue of section 73 of the Disaster Management Act, I cannot agree with that propositions. As clear from the statutory provision, what is protected under section 73 is an act done in good faith. Evidently, the order passed by the authority is justiciable in appropriate proceedings on the ground that it was not passed in good faith. However, since that is not an issue directly arising in this matter, I do not propose to make any further comment on it. Suffice to hold that, as long as Annexure A remains, the court below was not justified in ordering preliminary enquiry.

14. The learned Special Government Pleader assailed the order on the specific ground that sanction was required under section 19 of the PC Act. Section 19 of the PC Act bars taking cognizance without sanction. According to the learned counsel for the complainant, the question of sanction can arise only at the time when final report is laid and the court proposes to apply to its mind and to take cognizance of it. The question under section 19 cannot apply to a case of ordering preliminary enquiry. In Anil Kumar 's case(supra), Supreme Court proceeded to hold that requirement of sanction was a pre condition for ordering investigation under section 156(3) Cr.P.C., even at a pre-cognizance stage. Once it is noticed that there was no previous sanction, the Magistrate cannot order investigation against a public servant invoking section 156(3). This view was referred by the Supreme Court in **Narayana Swamy v. State of Karnataka and Others (AIR 2016 Supreme Court 4125)**. However, in

Manjju Surana v. Sunil Arora (2018 (2) KLT 315(SC) , supreme court raised doubt regarding the correctness of the finding and the question whether prior sanction for prosecution qua allegation of corruption in respect of a public servant was required before setting in motion even the investigative process under Section 156(3) of the Code of Criminal Procedure 1973 was referred to Larger Bench and is pending consideration. However, regarding the question of law that governs the field, pending larger Bench decision, the Division Bench of this Court had held that the dictum of the Supreme Court in Anil Kumar's case (supra). that Magistrate cannot order investigation under section 156(3) against a public servant without valid sanction from the Government will continue to hold good until the dictum was overruled or confirmed.

15. The learned counsel for the complainant answering this , contended that even accepting the above legal proposition, the question of bar under section 19 will arise only when the court propose to invoke jurisdiction under section 156 (3) . In the case at hand, according to the learned counsel, the above situation has not arisen. In the case at hand, the court has only ordered preliminary enquiry to decide whether a prima facie case worth for investigation under section 156(3) was made out. In that situation, the law laid down by the Supreme Court in Anil Kumar 's case cannot be attracted, it was contended. There is some force in the contention of the learned counsel for the complainant since the preliminary enquiry alone is ordered and not an investigation as contemplated under

section 156(3) Cr.P.C. In the light of the earlier finding that no sanction under section 17A was granted , I do not propose to make any further note on this question. .It is left open to be considered at the appropriate stage.

Having considered this, on the finding that sanction under section 17A was not obtained, I am inclined to set aside the impugned order. However, it is made clear that this will not preclude the complainant herein from challenging Annexure A order in appropriate proceedings. This will also not preclude the petitioner from approaching the court below, if sanction is obtained later. Reserving the right of the complainant to challenge Annexure A in appropriate proceedings, the Crl.R.P.is allowed. The impugned order is set aside.

Sd/-

SUNIL THOMAS

Judge

dpk

APPENDIX OF CRL.R.P.NO.571 OF 2020**PETITIONERS'S/ S EXHIBITS:**

ANNEXURE A	TRUE COPY OF THE GOVERNMENT ORDER DATED 11.08.2020 DECLINING PREVIOUS APPROVAL U/S 17A OF THE PC ACT.
ANNEXURE B	TRUE COPY OF THE ORDER DATED 30.05.2020 PASSED BY RESPONDENT NO.2
ANNEXURE C	TRUE COPY OF THE ORDER DATED 26.08.2020 IN CRL.M.P.NO.242/2020 OF THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE, THIRUVANANTHAPURAM.

RESPONDENT'S/ S EXHIBITS:

ANNEXURE R1(A)	COPY OF THE COMPLAINT DATED 5TH AUGUST 2020 VIDE CRL.M.P.NO.242/2020 ON THE FILE OF THE COURT OF ENQUIRY COMMISSIONER AND SPECIAL JUDGE, THIRUVANANTHAPURAM DATED 5.8.2020.
ANNEXURE R1(B)	TRUE COPY OF THE PROCEEDINGS VIZ., 1G.O.D.C.P.T.A/454/2018/D.M.3 DT.30.5.2020 ISSUED BY CHAIRMAN, PATHANAMTHITTA DISASTER MANAGEMENT AUTHORITY, WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE P1.
ANNEXURE R1(C)	TRUE COPY OF THE REPLY DT.10.6.2019 GIVEN TO AN UNSTARD QUESTION IN THE KERALA LEGISLATIVE ASSEMBLY, WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE P2.
ANNEXURE R1(D)	TRUE COPY OF THE LETTER VIDE F.NO.9-2/2019/FC DATED 26.2.2019 SENT BY DY.INSPECTOR GENERAL OF FORESTS TO THE PRINCIPAL SECRETARY TO DEPARTMENT OF FORESTS & WILDLIFE, GOVT. OF KERALA WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE-P3.
ANNEXURE R1(E)	TRUE COPY OF THE ORDER VIDE G.O.(RT)48/2019/F& WLD DATED 6.2.2019 ISSUED BY FORESTS & WILD LIFE DEPARTMENT, WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE P4.
ANNEXURE R1(F)	TRUE COPY OF THE ORDER VIDE G.O.(MS.11/2019/F & WLD

	DATED 22.5.2019 ISSUED BY FORESTS & WILD LIFE DEPARTMENT, WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE P5.
ANNEXURE R1(G)	TRUE COPY OF THE ORDER VIDE G.O.(MS.12/2019/F & WLD DATED 22.5.2019 ISSUED BY FORESTS & WILD LIFE DEPARTMENT, WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE P6.
ANNEXURE R1(H)	TRUE COPY OF THE GOVT. LETTER VIDE NO.C2/47/2020/FWLD DATED 2.6.2020 SENT TO PRINCIPAL CHIEF CONSERVATOR OF FORESTS & HEAD OF FOREST FORCE, THIRUVANANTHAPURAM BY ADDL.CHIEF SECRETARY, FOREST & WILD LIFE DEPARTMENT, WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE P7.
ANNEXURE R1(I)	TRUE COPY OF THE NEWS PAPER CLIPPINGS OF TIME OF INDIA DATED 4.6.2020 WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE P8.
ANNEXURE R1(J)	TRUE COPY OF THE NEWS PAPER CLIPPINGS OF MALAYALA MANORAMA DAILY DATED 4.6.2020, WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE P9.
ANNEXURE R1(K)	TRUE COPY OF THE NEWS PAPER CLIPPINGS OF MATHRUBHUMI DAILY DATED 4.6.2020, WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE P10.
ANNEXURE R1(LA)	TRUE COPY OF THE NEWS PAPER CLIPPINGS OF MADHYAMAM DAILY DATED 4.6.2020, WHICH HAS BEEN PRODUCED TOGETHER WITH COMPLAINT AND MARKED AS ANNEXURE-P11.
ANNEXURE R1(M)	TRUE COPY OF THE COMPLAINT DATED 6.6.2020 GIVEN TO THE DIRECTOR, VACB BY THE COMPLAINANT.