BOMBAY HIGH COURT

Parasnath Pande

Vs.

State (Bombay)

Criminal Application No. 862 of 1961, (With Criminal Application No. 885 of 1961)

(Naik and Patwardhan, JJ.)

06/07.07.1961

JUDGMENT

Naik, J.

1. These applications have been made by original accused Nos. 1 and 2 respectively under section 561-A Criminal Procedure Code for quashing the proceedings that are going before the Special Judge, Greater Bombay. The few facts, that are necessary for deciding the points that were urged o behalf of the applicants, may be set out as follows: Accused No. 2 is the Head master of a municipal school known as the Lower Parel Municipal Hindi School, and accused No. 1 is an Assistant teacher in the same institution. The son of one Rajaram Jadhav had passed the first standard in the said school and in the ordinary course, he would have been promoted to the second standard. It appears that accused Nos. 1 and 2 gave a promise to Rajaram that accelerated promotion would be granted to his son and instead of promoting him to the second standard, he would be given a jump and promoted to the third standard. For that purpose, they demanded a bribe of ₹ 20. Rajaram filed a complaint to the Anti corruption Bureau, Bombay on 10th September, 1958, and his statement was recorded by Police Sub-Inspector Patil and was treated as first information in the case. The same day, Police Sub-Inspector Patil made an application to the Presidency Magistrate, 16th Court, for permission to carry on investigation into the offence. In that application, he had asked for permission being granted to the "undersigned as well as to the officers and men of this Bureau". The learned Magistrate passed a laconic order in the following terms:

> "Permission granted".

2. Thereafter, Sub-Inspector Patil proceeded to arrange a trap and in that trap, accused No. 1 accepted a bribe of ₹ 20. But, at the same time, be told the investigating officer that he demanded

the bribe of and on behalf of accused No. 2. Therefore, a second trap was arranged and in the course of that trap, accused No. 2 accepted a sum of 20. In his house in the presence of accused No. 1. The sanction of the Municipal Commissioner was sought and was obtained on 19th February, 1959. Thereafter, charge-sheet was submitted to the then Special Judge Gosewade under the signature of the Inspector of Police Anti corruption Bureau. Cognizance was taken by Mr. Gosewade and process issued to the accused. The case came up for hearing on 9th August, 1960, and on that day a charge was framed under section 161 and 165 Indian Penal Code against accused No. 1 and under Section 34 Indian Penal Code. Along with the letter, he forwarded the papers of the re-investigation carried out by Sub-Inspector Patil. The case then came up before Judge Gatne and he framed the charges. At that stage again two preliminary objections were raised to the following effect :

> 1. The reinvestigation made by the Superintendent of Police, Anti-Corruption and Police Inspector, is incomplete and the requisite charge-sheet or report has not been submitted by him as required by section 173 (1) of the Code of Criminal Procedure and a copy of that report has not been furnished to the accused as required by section 173 (4) thereof.
> 2. No fresh sanction under section 6 of the Prevention of Corruption Act has been obtained after placing the papers of reinvestigation before the competent authority.

The learned Special Judge took the view that neither of these objections had any substance. Consequently, he directed that the accused should be proceeded with according to law. It is against this order that these two applications have been lodged before us by accused Nos. 1 and 2 respectively.

3. These applications purport to have been made under section 561-A Criminal Procedure Code, which provides:

> " Nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The contentions that were urged by Mr. Mengde, on behalf of accused No.1 and Mr. Pardiwala, on behalf of accused No.2 can be summed up under tow heads. Firstly, they contended that the investigation that was carried out by Sub-Inspector Patil was invalid and bore the stamp of illegality. This position was virtually conceded by the learned Additional Government Pleader and it was on that basis that the Division Bench had passed an order for re-investigation. That being the case the cognizance that was taken on the basis of illegal investigation cannot stand and will have to be quashed. For reinforcing this contention, Mr. Mengade referred to the provisions of the Criminal Law Amendment Act, 1952 (hereinafter referred to as the Act of 1952) and contended that the Special Judge, for all practical purposes stands in the position of a Sessions

Judge, and, therefore, cannot take cognizance of an offence on the basis of an illegal charge-sheet or a report. The second contention urged was that the sanction was accorded by the Municipal Commissioner on the basis of the material collected in the previous investigation, which has been declared to be an illegal investigation. It was quite possible that in the course of reinvestigation fresh material has cropped up. That being the case, the sanction lapsed and it was necessary that a fresh sanction should be accorded. Therefore, even if cognizance no longer survives and it will have to be quashed. Incidentally, Mr. Mengade also contended that the Special Judge has no power to direct a reinvestigation of the case and the so-called reinvestigation is the re-enactment of the same drama. Mr. Pardiwala went a little further and argued that, by the order of re-investigation, the original investigation stood cancelled and if that is so then cognizance taken on the basis of the original investigation must also come to an end.

4. We will take up these points one by one. So far as the power of the special Judge to take cognizance is concerned, we have, first of all, to consider the provisions of the Criminal Law Amendment Act of 1952. It is under the provisions of this Act that the Court of the Special Judge is constituted. So far as the Code of Criminal Procedure is concerned, criminal courts are broadly classified under two heads viz., Sessions Court and Magisterial Court. There is a third Court and that is the High Court, which is not relevant for the purpose of the present case. The Court of the Special Judge is not contemplated by the Code of Criminal Procedure. The Court of a Special Judge is a special creature of the Act of 1952 . The powers of the Special Judge flow from the provisions of the Act of 1952 and we have, therefore, to examine these provisions closely with a view to find out as to what are the powers and functions of a Special Judge. Sub-section (1) of section 6 of the Act of 1952 relates to the appointment of a Special Judge and provides:

> " The State Government may, by notification in the official Gazette, appoint as many Special Judges as may be necessary for such area or areas as may be specified in the notification to try the following offences, namely:-
> (a) an offence punishable under section 161, section 162, section 163, section 164, section 165 or section 165-A of the Indian Penal Code or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947;
> (b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a)".

Sub-section (2) lays down the qualification for such an appointment and in effect says that, that the person to be appointed as Special Judge must be either " a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1898". Section 7 of the Act of 1952 constitutes the Court of a Special Judge into a Court of exclusive jurisdiction for the trial of offences mentioned in sub-section (1) of section 6 of the Act. It lays down:

> "Every offence specified in sub-section (1) of section 6 shall be tried by the Special Judge

for the area within which it was committed or where there are more Special Judges than one of such area, by such one of them as may be specified in this behalf by the State Government".

Section 8 of the Act is very important and is divided into four sub-sections. Sub-section (1) provides:

"A Special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898, for the trial of warrant cases by Magistrates".

Sub-section (2) , in effect, provides:

"A special Judge may tender a pardon to an accomplice and in doing so, he shall be deemed to have acted under section 338 of the Code of Criminal Procedure".

Sub-section (3), in effect provides:

" The provisions of the Code of Criminal Procedure shall apply to the proceedings before a Special judge, so far as they are not inconsistent with this Act; and for the purposes of the said provisions, the Court of the special judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor".

Sub-section (3-A) lays down:

"In particular, and without prejudice to the generally of the provisions contained in sub-section(3) the provisions of section 350 of the Code of Criminal Procedure, 1898 (5 of 1898), shall, so far as may be, apply to the proceedings before a Special Judge, and for the purposes of the said Provisions a Special Judge shall be deemed to be a Magistrate".

Sub-section (4) is not material for our present discussion. Section 9 of the Act of 1952 relates to appeal and revision and, in effect, provides:

"For the purposes of appeal and revision to High Court. The Court of a special judge shall be deemed to be a Court of Session trying cases without a jury".

5. Mr. Mengade contended that except for the purposes of sub-section (3-A) of section 8 of the Act of 1952, a Special Judge stands in the position of a Sessions Judge trying a case without the aid of a jury or assessors. He has advanced this argument with a view to show that, in any case, a Special Judge cannot be considered to be a magistrate and if that is so, he is not capable of taking

cognizance of the offences under section 190 Criminal Procedure Code. There was a good deal of argument as to whether section 190 Criminal Procedure Code applies to a Special Judge. Before considering the various ramifications into which this argument has run, it would do well to remember the broad outlines of section 190, Criminal Procedure Code. That section empowers a Judicial Magistrate to take cognizance of any offence in any of the following cases:

> "(a) upon receiving a complaint of facts which constitute such offence;
> (b) upon a report in writing of such facts made by any police officer;
> (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed."

6. Mr. Mengde then referred to Section 193 Criminal Procedure Code and contended that so far as the Sessions Court is concerned, it cannot ordinarily take cognizance of an offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf. Mr. Mengde argued that all that has been done by sub-section (1) of S. 8 of the Act of 1952 is to remove the bar that has been placed in the way of Sessions Judge taking cognizance without an order of commitment under Section 193 Criminal Procedure Code. In that connection, he laid emphasis upon the language of sub-section (1) Section 8 of the Act of 1952 which runs thus :

> "A Special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused, shall follow the procedure prescribed by the Code of Criminal procedure, 1898, for the trial of warrant cases by Magistrates".

7. According to Mr. Mengde, this Section is negative in character and serves the purpose of removing the impediment in the way of the Sessions Judge taking cognizance of a case without commitment. There is no positive provision under which the Special Judge is clothed with the authority or jurisdiction to take cognizance of an offence. If this argument is pushed to its logical conclusion, it would mean that under no circumstances, a Special Judge has powers to take cognizance of a case. Section 190 Criminal Procedure Code in terms applies to a magistrate. Section 190 Criminal Procedure Code cannot, therefore, be invoked for clothing the special judge with authority to take cognizance of a case. There is also another reason as to why section 190 Criminal Procedure Code may not be strictly applicable to the case of a Special Judge and it is this that, one of the conditions precedent for the Special Judge taking cognizance is the existence of a valid sanction by the competent authority under Section 6 of the Act of 1947. In other words, Mr. Mengde's argument leads to the astounding conclusion that a Special Judge has no authority to take cognizance of a case even on the basis of a police report or a charge-sheet. With a view to buttress this line of reasoning, Mr. Pardiwala pointed out that whenever the Code of Criminal Procedure gives power to a Court to take cognizance, it also prescribes the manner and the method in which cognizance can be taken. In that connection, he referred us to section 190, section 193 and section 194 Criminal Procedure Code. According to Mr. Pardiwala, in so

far as the legislature has not provided the manner in which the Special Judge can take cognizance of an offence, there is a lacuna and that lacuna can only be rectified by a suitable amendment. We are unable to accept this line of reasoning. It is clear to our mind that the provisions of section 8(1) of the Act of1952 are not essentially negative in character. The opening part of sub-section (1) of section 8 viz., " A special judge may take cognizance of offences ....." is obviously of a positive character. It clothes the Special judge with the authority to take cognizance of an offence. It is true that the manner in which cognizance can be taken has not been defined or specified in the Act of 1952. That does not mean that the power that has been granted is illusory or is incapable of being exercised. According to us, the manner has not been specified, because the legislature wanted to clothe the Special Judge with wide authority of taking cognizance in all conceivable cases. Section 190 Criminal Procedure Code is illustrative as to how and under what circumstances, the Magistrate can take cognizance of an offence. It is true that the provision of section 190 Criminal Procedure Code a Magistrate can act on a private complaint. He can act on a report in writing by a police officer and he can also act upon information received from any person and what is more, he can also act upon his own knowledge or suspicion that an offence has been committed. It is possible to hold that these categories cover the entire gamut. Mr. Mengde contended that it was very easy for the legislature to have e referred to section 190 Criminal Procedure Code and say that the Special judge can take cognizance or may take cognizance in all the cases in which the Magistrate can take cognizance under section 190 Criminal Procedure Code. As stated above, the reason for not so doing may be the the legislature wanted to confer even wider powers than what has been contemplated by section 190 Criminal Procedure Code. It may as well be that reference to section 190 Criminal Procedure Code was not made, because of the difficult that one of the conditions precedent in taking cognizance of an offence is the receipt of a prior sanction by the competent authority. Whatever that may be, merely because wide words have been employed and the manner of taking cognizance has not been specifically set out, it is not possible to take the view that the Special Judge has no power to take cognizance of an offence, for to put such a construction would be to nullify the positive words used by the legislature viz., " A Special Judge may take cognizance of offences ..." in section 8 (1) of the Act of 1952. In our view, section 8 (1) of the Act gives clear authority to the Special Judge to take cognizance of an offence and no limitation as been placed as to how he should do it. He may act on a report submitted by a police officer. He may act on a private complaint or he may also act o the basis of any information derived form any source and also on his personal knowledge and suspicion. The powers of the Special Judge in the matter of taking cognizance are wide and untrammeled. It is true that the Prevention of Corruption Act contemplates an investigation . An investigation carried out by police officers culminates in a char-sheet. Section 5A the Act of 1947 provides:

> " Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police officer below the rank-
> (a) in the presidency towns of Madras and Calcutta of an Assistant Commissioner of Police,

(b) in the presidency town of Bombay, of a Superintendent of Police, and
(c) elsewhere, of a Deputy Superintendent of Police,
shall investigate any offence punishable under section 161, section 165 or section 165A of the Indian Penal Code or under sub-section (2) of section 5 of this Act, without the order of a presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant".

This pre-supposes that an investigation would be ordinarily carried out according to the provisions of the Code of Criminal Procedure. But the submission of a report in writing by the police is not the only way in which a Special Judge can take cognizance of an offence. For instance, in respect of an offence under Sections 162 to 164 Indian Penal Code, it would be open to the Special Judge to take cognizance in other ways, e.g., on a private complaint or on the basis of information received by him in any other manner. In construing the provisions of Section 8(1) of the Act of 1952, we are not limited by the provisions of the Act of 1947 and in particular by section 5A thereof. Originally, section 6 of the Act of 1952, as it stood before its amendment in 1958 provided that the Special Judge is to be appointed for trying offences under section 161, section 165 or section 165A Indian Penal Code or sub-section (2) of section 5 of the Act of 1947. Clause (a) of section 6 of the Act of 1952 was amended to include sections 162 to 184 Indian Penal Code, with the result that the Court of the Special Judge will the a Court of exclusive jurisdiction for trying offences even under section 162 to 164 Indian Penal Code. So far as investigation into offences under sections 162 to 164 Indian Penal Code is concerned, there is no limitation similar to the limitation imposed by section 5A of the Act of 1947. The investigation into those offences can b carried out by an officer of a police station under the provisions of the Code of Criminal Procedure. But, there may be cases where cognizance in respect of those offences can as well be taken by the magistrate otherwise than no a police report. We have, therefore, no doubt in our mind that the powers of a Special Judge to take cognizance of offences specified in section 6 of the Act of 1952 are wide and unlimited.

8. If the above view is correct, then the question as to whether the Special Judge is a Sessions Judge or a Magistrate becomes of an academic importance. The Special Judge is a creature of the Criminal Law Amendment Act, 1952. He enjoys a special status under the Act and is clothed with such powers as have been given to him by the provisions of the Act. It is true that the qualification for the appointment of a Special Judge is that he must be either a Sessions Judge or an Additional Sessions Judge or an Assistant Judge. But the qualification for making the appointment has nothing to do with the powers of a Special Judge. So far as the procedure for trial of cases by the Special Judge is concerned, section 8 of the Act of 1952, lays down that he shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrate. So far as trial of cases is concerned, the Special Judge stands in the position of a Magistrate. But, so far as taking cognizance of cases, which precedes the trial is concerned, special provision has been made in sub-section (1) of section 8 of the Act of 1952, For that purpose, it is not necessary to consider as to whether he is a Magistrate or whether his a Sessions

Judge. So far as tendering of pardon is concerned, the Special Judge is assimilated to the position of a Session Judge who acts under the Code of Criminal Procedure. Mr. Mengde relied, in particular, upon the provisions of sub-sections (3) and (3A) of section 8 of the Act of 1952. Sub-section (3) lays down:

> " Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898, shall, so far as they are not inconsistent with this Act, apply to the proceedings before a Special Judge; and for the purposes of the said provisions, the Court of the special judge shall be deemed to be a Court of Sessions trying cases without a jury,....."

Mr. Mengde argued that for the purposes other than the purposes mentioned in sub-section (1) and (2) of section 8, the Special Judge stands in the position of a Sessions Judge. The same argument holds good so far as appeal or revision from the order of the Special Judge are concerned and for which provision has been made in section 9 of the Act of 1952. Sub-section (3A) , which is inserted in 1958, provided : that the provisions of section 350 Criminal Procedure Code shall apply to the proceedings before a Special Judge and for the purpose of the said provisions, a Special Judge shall be deemed to be a Magistrate. Section 350 Criminal Procedure Code makes provision as to how a succeeding magistrate is to proceed, when his predecessor had heard the case partly and recorded some evidence in the case. This amendment was made with a view to set the conflict of judicial opinion at rest. It is however, necessary to remember that the opening words of sub-section (3A) of section 8 of the Act of 1952 make it clear that the provisions of that sub-section did not in any way derogate from the other provisions of S. 350 Criminal Procedure Code. There is, therefore, no simple answer to the question as to whether a Special Judge is more of a Magistrate or more of a Sessions Judge. He is neither a Magistrate or a Sessions Judge. He acts as a Magistrate for some purpose and as a Sessions Judge for other purposes. The Special Judge is a creature of a statute and enjoys a unique position, which is not known to the Code of Criminal Procedure. As stated above, whatever the position of a Special Judge, he has been clothed with Special authority to take cognizance of offences under section 8 of the Act of 1952 . Even if, therefore, it is assumed that none of the provisions of the Code of Criminal Procedure governing the taking of cognizance including S. 190 Criminal Procedure Code is applicable to a Special Judge, still that will not affect his powers of taking cognizance of a case.

9. All this discussion has arisen, because there is some doubt about the legality of the investigation that was carried on by sub-Inspector Patil. Mr. Mengde contended that in view o the concession made by the learned Government Pleader before the Division Bench, it is clear that the investigation carried out by Sub-Inspector Patil was unauthorised and therefore, illegal. We do not propose to pronounce any opinion on this question except to say that the judgment recorded by the Division Bench makes no reference to any concession made by the Government Plaeder and all that is stated in the judgment is that the Government Pleader suggested that the best course to be followed is to direct a fresh investigation by the Superintendent of Police.

However, for the purpose of considering the arguments advanced before us, we are prepared to proceed on the footing that the investigation carried out by Sub-Inspector Patil bore the stamp of illegality and that it was some in violation of the mandatory provisions of section 5-A of the Act of 1947. Even so, the fact remains that, the then Special Judge, Gosevade took cognizance of the case, issued processes and framed charges against the accused. The short question, therefore, for our consideration is, whether the action taken by the Special Judge Gosewade can be considered to be illegal or void merely because he acted on the material collected by an officer who was not authorized to do so and on the basis of a charge-sheet submitted by him. Even if that officer had no authority to carry out the investigation and to submit a charge-sheet, the fact remains that he did collect certain material and placed it before the sanctioning authority in the first instance and after obtaining the sanction, placed it before the Special Judge, who was pleased to take cognizance on the basis of that material. If the charge-sheets regarded as bearing the stamp of illegality, then the Special Judge, could not act on its basis as a charge-sheet properly so called. Act the same time, we are unable to understand what prevented him from treating it as a complaint and action on the same. It has been held by the Supreme Court in *Rishbud v. State of Delhi*[1], (S) that a trial is not vitiated merely because the investigation bore the stamp of illegality. Now, if a trials not vitiated by reason of any illegality in the process of investigation we are unable to understand how cognizance can be so vitiated. As pointed out above, the Special Judge has wide powers taking cognizance of an offence. In other words, he can act on any material tat has been placed before him and he need not stop to consider whether the material placed before him has been collected in a legal way and through the proper medium of an authorized person. Mr. Mengde contended that the Special Judge would not have taken cognizance of the offence, if there had have taken investigation whatsoever in the matter or if the sanction of the Magistrate. We are not prepared Judge, would not take cognizance against public servants unless a report of the investigation carried out by a duly authorized personing in law, which prevents him from doing so. In this connection, reference may be made to a decision of the Supreme Court in *Din Dayal v. State of U.P*[2]., In that case, the investigation was carried out by a police officer below the rank of Deputy Superintendent of Police without sanction from the Magistrate. Cognizance was taken in due course and

[1]1955 AIR. SC. 196

[2] AI 1959 SC 831

thereupon the trial followed at the end of which the accused was convicted. It was held ;

> "Generally a conviction is not vitiated because there has not been strict compliance with the provision of the Act I the matter on investigation by a police officer,"

10. The Supreme Court followed the earlier decision in Rishbud's case, (S) . The same view was taken by our High Court in *Emperor v. Rustom Ardeshir Banaji*[3] wherein it was held that even if the holding of an investigation by a Sub-Inspector and the consequent charge-sheet submitted by him be regarded as irregular, the validity of the trial was not affected by that irregularity.

11. Incidentally, it was contended that neither the High Court nor the Special Judge had any

authority to direct reinvestigation. In that connection, Mr. Mengde drew our attention to the provisions of sections 155 and 202, Criminal Procedure Code. He pointed out that these are the only sections under which the Magistrate can direct investigation. Under sub-section (2) of section 155, Criminal Procedure Code the Magistrate can ask the police officer to investigate a non-cognizable case, Under section 202, Criminal Procedure Code, the Magistrate can direct investigation in respect of allegations contained in a private complaint. Mr. Mengde contended that to carry on an investigation in a cognizable offence is the privilege of the police and no court has any right or authority to regulate or interfere in any manner with that investigation. Except in respect of the situation described in sections 155 and 202, Criminal Procedure Code, no Magistrate has nay right to direct the police officer to investigate into a case much less to reinvestigate the same. The Supreme Court in Rishbud's case, (S) referred to section 202, Criminal Procedure Code. It also referred to the inhere at powers of the Special Judge to direct reinvestigation into an offence. The Supreme Court referred to section 202, Criminal Procedure Code by way of an analogy and stated that the procedure of directing an investigation by Magistrate is contemplated by the Code of Criminal Procedure and for illustrating that proposition, it mentioned section 202, Criminal Procedure Code. Mr. Mengde argued that section 202, Criminal Procedure Code comes into operation only if the conditions prescribed therein are fulfilled viz., (1) that a complain has been received, and (2) that the Magistrate is authorized to take cognizance of the case. According to Mr. Mengde a Special Judge, who has not received a Private Complaint, cannot act under section 202, Criminal Procedure Code. He also pointed out that section 202, Criminal Procedure Code in terms applies to the action to be taken by a Magistrate and a Special Judge is not a Magistrate. There is considerable substance in this line of reasoning.

12. The Supreme Court in Rishbud's case. (S) were dealing with a peculiar set of facts. In respect of two cases, the first information disclosed offences falling under section 5 of the Prevention of Corruption Act. That being the case, the investigation that was contemplated into those offences can only be carried out by an officer described in section 5A. The Charge-sheet in those case were filed on 11th August 1951 by a Sub- Inspector of Police, R.G. Gulabani and it appears that he applied to the Magistrate for permission to investigate into those cases on 29th March 1951. Gulabani gave evidence and that evidence showed that so far as the case relating to Criminal Appeal No. 97 of 1954 is concerned, he did not make any investigation at all excepting to put up the

[3](1949) 49 Bom LR 821

charge-sheet. All the prior stages of the investigation were conducted by a number of other officers of the rank of Inspector of Police of Sub- Inspector of Police and none of them had taken the requisite permission of the Magistrate. In the case out of which Criminal Appeal No.96 of 1954 arose, the evidence of Gulabani showed that he took up the investigation after he obtained permission and partly investigated it thereafter. But, the major part of the investigation was done by a number of other officers who were all below the rank of Deputy Superintendent of Police without having obtained form the Magistrate the requisite sanction therefor . On these facts, it

was held by their Lordships:

> "Both these are cases of clear violation of the mandatory provisions of section 5 (4) of the Act (of 1947) ".

This was one set of case. In the Second case, the first information disclosed offences against persons who were not public servants. The case was registered under Section 240 Indian Penal Code and section 6 of the Essential Supplies (Temporary) Powers Act, 1946 and not under any offence comprised within the Prevention of Corruption Act. The investigation was started on 2nd May 1949. It appears that in the course of this investigation, it was found that the two appellants and another public servant were liable to be prosecuted under section 5 (2) of the Act of 1947. Application was then made to the Magistrate by Balbir Singh for sanction being accorded to him under section 5(4) of the Act of 1947 and the same was given on 20th March 1951. The charge-sheet was filed by Balbir Singh on 15th November 1951. On these facts, their Lordships held:

> "But, since the investigation prior to the sanction was with reference to a case registered under section 420 , Indian Penal Code and Section 6 of the Essential Supplies (Temporary) Powers Act, 1946, that was perfectly valid".

It was only when the material so collected disclosed the commission of an offence under section 5 (2) of the Act by public servants that any question of taking the sanction of the Magistrate for the investigation arose. Their Lordships further held:

> "In such a situation the continuance of such portion of the investigation, as remained, as against the public servants concerned by the same officer after obtaining the permission of the Magistrate was reasonable and legitimate".

So far as the direction contained in respect of the first set of cases is concerned, we have to refer to two passages in the judgment of the Supreme Court. The first passage is at p. 204 of the judgment, and it runs thus:

> "It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such investigation as the circumstances of an individual case may call for."

These observations, evidently, apply to a situation where the Magistrate, before taking cognizance, has noticed the invalidity or illegality of the investigation. In that situation, their Lordships have suggested a particular course to be followed by the Magistrate and it is this that,

the Magistrate should not refuse to take cognizance of a case but should suspend the Judgment and take necessary steps to get the illegality cured and the defect rectified by ordering such investigation as the individual case may call for. The other passage occurs at p. 205 and it runs thus:

> "In our opinion, therefore, when such a breach is brought to the notice of the Court at an early stage of the trial the Court will have to consider the nature and extent of the violation and pass appropriate orders for such reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate with reference to the requirements of section 5A of the Act. It is in the light of the above considerations that the validity or otherwise of the objection as to the violation of section 5(4) of the Act has to be decided and the course to be adopted in these proceedings, determined".

The observations in this passage have relation to a later stage that is to say, an early stage of the trial. If the illegality has been noticed at that stage, their Lordships have suggested that such reinvestigation, as may be called for wholly or partly, can be directed. Even so, it is significant to note that in the first set of cases, their Lordships have not given any directions to the Special Judge to order reinvestigation in the case. All that is stated is as follows:

> "In the view we have taken of the effect of such violation it becomes necessary for the Special Judge to reconsider the course to be adopted in these two cases."

13. Mr. Mengde contended that no reinvestigation in the proper sense of the terms can be directed in a case where a trap has been laid for the simple reason that the trap cannot be re-enacted at the second investigation or reinvestigation. There is considerable substance in this line of argument. As pointed out above their Lordships have contemplated two sets of cases, the first where cognizance has not yet been taken and the second where the trial has commenced but it has not progressed very far. So far as the first situation is concerned, it would be the duty of the Magistrate to direct a fresh investigation. So far as the second situation is concerned, it is for the Special Judge to decide as to whether reinvestigation is necessary and also to decide upon the kind of reinvestigation that can be usefully carried out in the circumstances of the case. It is not as if their Lordships of the Supreme court have laid down that in every case, where it has been discovered that the investigation is illegal that reinvestigation must be directed. The question of re-investigations been left for the decision by the Special Judge in each set of circumstances. We will consider the implication of these observations at a later stage of the judgment. For the time being, the question, which we are considering is, whether the Special Judge can direct reinvestigation in a case. Whatever the nature of the reinvestigation may be, we have already pointed out that if the investigation is illegal and the report, which is the culmination of the investigation is invalid and bears the stamp of illegality, then the report can be treated as a complaint and acted upon as such. If that is so, then it would be open to the Special Judge to direct an investigation by invoking the provisions of section 202 Criminal Procedure Code by

analogy. Section 202 Criminal Procedure Code in terms applies to the Magistrate. But, there is no reason why the provisions of that section cannot be invoked by the Special Judge particularly so, for the purpose of curing a defect or an illegality. The defect or illegality, in effect, nullifies the protection that has been given to the public servants viz., that if the investigation is not carried out by an officer of a specified rank, then the police officer cannot undertake the investigation without securing the sanction of the concerned Magistrate. By reason of the fact that a police officer of a lower rank carried out the investigation without proper order or sanction from the Magistrate, the salutary protection from harassment that has been granted to the accused has been withdrawn and an objection has been taken at the early stage of the trial viz., that the investigation has been carried by the person who is not authorized to do so. Now, it is for the purpose of giving an opportunity to an officer of the specified rank to apply his mind afresh to the question and to come to his own conclusion that reinvestigation is to be directed. It would be futile to the accused to argue that even for such a purpose investigation cannot be ordered under section 202 Criminal Procedure Code. Their Lordships of the Supreme Court have also referred to the inherent powers of the Special Judge. Mr. Mengde argued that except the High Court, the Code of Criminal Procedure has not conferred inherent jurisdiction upon any other Court. But, as pointed out above, the Special Judge is not a creature of the Code of Criminal Procedure and merely because the Code does not confer any inherent jurisdiction upon the Court other than the High Court we cannot jump to the conclusion that the Special Judge has no inherent jurisdiction. Whatever that may be, w e are bound by the observations made by the Supreme Court and we must respectfully follow them. It has laid down in clear terms that a Special Judge can act under section 202 Criminal Procedure Code or under his inherent powers in so far as he directs an investigation into the case.

14. We will now pursue the discussion of the question which we have left in the middle of the preceding paragraph and that is regarding the effect of the order of reinvestigation. This question will also have significance in deciding the second point viz., as to whether a second sanction is necessary under section 6 of the Act of 1947. Mr. Mengde argued that a reinvestigation is either a futile farce or is a matter of substance. If it is a matter of substance, then there is a possibility of the officer of the specified rank coming to a different conclusion as a result of reinvestigation. In order to appreciate this argument, it is necessary to consider the nature and scope of reinvestigation. It is a fallacy to suggest that reinvestigation effaces or supersedes the first investigation. It must be remembered, as has been laid down in Rishbud's case, (S) that it cannot be maintained that a valid or legal police report is a foundation of the jurisdiction of the court to take cognizance of a case. In other words, if the cognizance is taken on the basis of a previous investigation, that cognizance remains and is not affected by the order of reinvestigation and the consequent reinvestigation, whatever be its nature and extent. Reinvestigation is not obligatory. The nature and scope of reinvestigation must necessarily depend upon the facts and circumstances of each case. In trap cases where the accused has been caught red-handed in the act of accepting a bribe, reinvestigation may amount more or less to rehearsal of what has already taken place. Again, as pointed out above, where reinvestigation has been directed before

taking cognizance of a case, reinvestigation may be very much a genuine and real affair. In our view, the object of reinvestigation is not to cure the invalidity or illegality of the earlier investigation. But, the main object is to minimize the possible hardship that may have been caused to the accused by reason of the fact that investigation was carried out by an officer below the designated rank. In other words, reinvestigation is ordered in fairness to the accused. In most cases, there is very little chance of any new material coming to light in the course of reinvestigation. All that may happen in the course of reinvestigation is that, a superior officer may have the opportunity of applying his mind to the material already collected and satisfying himself about the integrity of the first investigation. Mr. Mengde complained that the accused is placed on the horns of a dilemma. If he raises the objection that investigation bears the stamp of illegality, reinvestigation would be directed which will take the winds off the sail of defense. On the other hand, if he did not do so, then it will not be possible for him to complain that prejudge has been caused to his case by reason of the illegality in the investigation. There is substance in this grievance. We are however, confident that reinvestigation would not and should not be directed as a matter of course or routine. The Court should examine the facts of each case and then pass an appropriate order bearing in mind that the object is not to cure any illegality but to afford an opportunity to the superior police officer to review the facts of the case. It will always be open to the accused to plead that miscarriage of justice has been caused by reason of the violation of the mandatory provisions on account of the first investigation having been undertaken by an officer below the designated rank. So far as Mr. Pardiwala's argument viz., that cognizance taken on the basis of invalid investigation lapses, is concerned, it may be pointed out that the Act of taking cognizance is a judicial act and can only be undone by a judicial order. In exceptional cases it may be open to the Special Judge or the Magistrate, who has taken cognizance himself, to annual the cognizance. Normally, it will be the function of a superior Court to set aside the cognizance. So long as cognizance, which is already taken, has not been set aside by a proper judicial order, the cognizance continues and the order of re-investigation would, in no way, affect the cognizance. For instance, if the officer, to whom re-investigation has been entrusted comes to a different conclusion from the one reached by his predecessor in the course of the first investigation, it will be open to the Special Judge who has taken cognizance to proceed to discharge the accused at the very commencement of the trial. The arguments advanced by Mr. Mengade and Mr. Pardiwala appear to us to have been based on a misconception regarding the proper function of the investigating agency. The function of the investigating agency is to collect material, which will be utilized at the time of the trial. Assuming, for a moment, that fresh material has been collected in the course of re-investigation, that material by itself will not affect the cognizance that has been taken, because, after all, the material has got to be proved in the course of the trial that takes place after cognizance is taken. The material collected, whether in the course of the first investigation or the second investigation, is not evidence unless the same has been proved in a formal way in the course of the trial. Considering the question from any point of view, we feel no hesitation in rejecting the argument viz., that re-investigation has the effect of effacing the first investigation and superseding the cognizance that has already been taken on the basis of the first investigation.

15. That takes us to the second argument viz., that a fresh sanction is necessary because a fresh investigation has taken place. Our attention was drawn to the order of the sanction wherein the Municipal Commissioner has stated that he was issuing the sanction upon a perusal of the record of investigation. It was contended that since the possibility of new material cropping up in the course of re-investigation cannot be excluded, the sanction that was granted on the basis of the old investigation must necessarily lapse. This argument is based on an assumption. We do not know whether, as a matter of fact, in the course of reinvestigation fresh material has been collected and new facts have come to light. Whether that is a fact or not can only transpire in the course of the evidence of Shetye, the police officer, who undertook the second investigation. It is difficult to imagine that new facts will be collected in the course of fresh investigation. The possibility of collecting even fresh material and fresh evidence is very much remote. The first pint, which must be noted, is that the sanction that was granted on the basis of invalid investigation is not illegal. Section 6 of the Act of 1947 does not enjoin the sanctioning authority to look into any particular papers. It does not lay down that the officer authorized to grant the sanction must peruse the investigation papers. The sanctioning authority can proceed on any material which, according to him, is sufficient or trustworthy. He is not concerned to find out even the truth or otherwise of the facts disclosed to him. All that is necessary for the sanctioning authority to do is to apply his mind to the facts as disclosed to him and to accord sanction to the offence that would be disclosed on the facts placed before him. The grant of sanction is not a judicial act. It is purely an executive act. It has been laid down by the Madras High court in the matter of Kalagava Bapiah, ILR 27 Mad 54:

> "But the Government, in according or withholding sanction, under section 197 (for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant), acts purely in its executive capacity and the sanction need not be based on legal evidence".

The sanction accorded, in the present case, is not attacked on the ground that the sanctioning authority had not applied his mind to the facts constituting the offence. What is contended is that the material placed before him was illegally collected and the sanction in so far as it is based on illegally collected material, is invalid. This argument is not sound, and, as stated above, sanction can be accorded on any material sufficient or otherwise collected in. lawful manner or otherwise. The next stage of the argument is that, by reason of the fact that a fresh investigation has taken place, the sanction already accorded must necessarily lapse. We are unable to accept this line of argument. We have already considered the nature and scope of re-investigation and also its object. Even if fresh material is assumed to have been collected in the course of fresh investigation, it would not affect the sanction, accorded earlier. The argument assumed a subtler from at the hands of Mr. Pardiwala. He pointed out that the material that has gone to the sanctioning authority has gone through a distorted medium. The sanctioning authority must see through the medium of the representations made to him. He cannot see the facts as they are. The

subjective element in the appraisal of the material, according to him, cannot be ignored. This argument will have required some force has it been the rule that it is necessary for the sanctioning authority to find out the truth or otherwise of the facts brought to his notice. The question of a mis-appreciation of the material by the sanctioning authority by reason of the fact that the medium is distorted does not arise. The Supreme Court has laid down in *Indu Bhusan v. State of West Bengal*[4].

> "It was not for Mr. Bokli to judge the truth of the allegations made against the appellant by calling for the records of the connected claim cases or other records in connection with the matter from his office."

16. We are, therefore, satisfied that the sanction that was already granted remains valid and there is no need of any fresh sanction after re-investigation.

[4]1958 AIR. SC. 148

17. The result is that the applications fail and the rules are discharged.

Rules discharged.